The present Work also contains, amongst many other additions, the Practice of Special Cases, as well as The Trustee Acts—The Trustees Relief Acts—The Charitable Trusts Act, with the Minutes, Regulations, Instructions and Forms required by the Charity Commissioners to be observed on applications to them under the Act—and that portion of the Act 13 & 14 Vict. c. 35 (Sir George Turner's Act), which confers indemnity on Executors and Administrators in the administration of Assets, by a short process under the sanction of this Court. The orders and decisions of the Court under these several Acts are also given in a form convenient for general reference.

It has not been thought necessary to retain the Analysis which formed the first part of the First Edition; the material parts of which are nevertheless embodied in the present Edition, being disseminated throughout the Work.

DISTINGUISHING SIGNS.

THE letter (A), when used in connection with General Orders of the 7th August, 1852, signifies that the Orders referred to are those of that date relating to the General Practice of the Court.

The letter (B), when used in connection with General Orders of the 7th August, 1852, signifies that the Orders referred to are those of that date relating to Appeals, Rehearings and Enrolments.

The letters G. O. signify "General Orders."

ERRATA.

At page 31, *dele* the whole of the 6th and 7th lines from the bottom.

At page 195, in the 13th line from the top—*for* "mortgage" *read* "mortgagee."

At page 269, in the 12th line from the top—*for* "convict" *read* "commit."

At page 282, in the 4th line from the top—*for* "3rd General Order, 1st June, 1851," *read* "3rd General Order, 1st June, 1854."

At page 312, under heading "*Title Deeds*"—*for* "The vendor must deliver the title," *read* "The vendor must deliver the title deeds."

At page 658, in the side note to section 33—*for* "duputy" *read* "deputy."

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THE

New Practice

OF THE

HIGH COURT OF CHANCERY.

PART I.

PROCEEDINGS UP TO DECREE OR DECRETAL ORDER.

I. Proceedings for Plaintiffs by Bill.

PARTIES TO A SUIT.

The general strict rule of this court, but which has, from time to time, been greatly modified, is, that all persons materially interested in the subject of the suit must be made parties. The court has been in the habit of relaxing this rule in cases where, from the number of the persons interested, or from any other reasonable cause, it would be impracticable to apply it. (*Cockburn* v. *Thompson*, 16 Ves. 325.) And so, a creditor or legatee was, even before the recent regulations respecting parties, permitted to institute a suit on behalf of himself and all the other creditors or legatees. So might one of many creditors file a bill on behalf of all to carry the trusts of a creditor's deed into execution. (*Weld* v. *Bonham*, 2 S. & S. 91.) The same indulgence was also shown in other cases, in which the court felt itself able to do justice without requiring the presence of all the persons

interested. But the rules diminishing the numbers of parties to suits have more recently been greatly extended, with a view to obviate manifest practical inconveniences, as well as unnecessary expense and delay.

By the 31st G. O. 26th August, 1841, it is provided, "That in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him."

By the 32nd G. O., 26th August, 1841, it is provided, "That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

This order was held not to apply to a general administration suit. (*Hall* v. *Austin*, 2 Coll. 570; 15 L. J. 384; 10 Jur. 452; see also *Biggs* v. *Penn*, 4 Hare, 469; 9 Jur. 368.) Nor to a suit by one of two sureties to set aside a bond for fraud, the principal debtor and co-surety being held necessary parties. (*Allan* v. *Houlden*, 6 Beav. 148.) So also, to apply this rule in cases of principal and surety, the defendants must be liable in the same character, and consequently the court held that the plaintiff could not file his bill against a surety without making the principal a party; although he may elect against which of two principals, or which of two sureties, he will proceed. (*Lloyd* v. *Smith*, 12 L. J. 457; 7 Jur. 460.)

By the 5th rule of the 42nd section it is provided, that in all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and all persons having the same interest; and by the 9th rule of the same section it is provided, that in all suits concerning real or personal estate, vested in trustees under a will, settlement or otherwise, such

trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and that in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but in any of these cases the court may, upon consideration of the matter, if it shall so think fit, order such persons, or any of them, to be made parties. This last-mentioned rule is an extension of the 30th G. O. of August, 1841. It applies to all suits where the interest of the cestui que trust is represented, and his powers vested in the trustee. (*Fowler* v. *Bayldon*, 9 Hare, App., 78.) The devisees and executors of a mortgagor sufficiently represent, under the 42nd section, the cestuis que trust of the equity of redemption, who are not therefore necessary parties to a foreclosure suit (*Hannam* v. *Riley*, 22 L. J. 110); and where the persons having the control over the mortgaged property, and over the personal estate of the mortgagor, are present on the record, the cestuis que trust of the equity of redemption are not necessary parties. (*Sale* v. *Kitson*, 10 Hare, App., 1; 17 Jur. 170; 22 L. J. 344; 20 L. T. 320.) But where the surviving trustees, or the representatives of the trustees alone, are parties, the court requires the cestuis que trustent to be also represented, in order to secure the due application of the trust property. (*Stansfield* v. *Hobson*, 16 Beav. 189.) So are the cestui que trustent necessary parties in a suit for foreclosure against the infant heir-at-law, where the devisees in trust have disclaimed, and there are not before the court any adult parties who would be in possession of funds to redeem. (*Young* v. *Ward*, 10 Hare, App., 51.) The court declared whether children took per capita or per stirpes in the absence of the personal representatives of some of the children who had died. (*Abrey* v. *Newman*, 10 Hare, App., 58; 17 Jur. 153; 22 L. J. 627.) Though the cestui que trust is not a necessary party to a

creditor's suit, he is not precluded from taking advantage of the Statute of Limitations against a debt by the omission of the devisee in trust of real estate to do so, even if the executor does not set up that defence, but the residuary legatee cannot do so if the executor does not. (*Briggs* v. *Wilson*, 2 Eq. Rep. 153.) The trustees of a will of real estate, and the parties entitled to the produce of the sale of the estate, were parties to a suit to administer the trust, but one of the latter having married, her share was made the subject of a settlement, and it was held that the trustees of the settlement were necessary parties, and that they would sufficiently represent the interests of the children of the marriage. (*Densem* v. *Elworthy*, 20 L. T. 217.) Where a testator left his property to his wife for life or widowhood, with remainders over to other parties after her death or second marriage, and appointed two executors, but some of the parties entitled in remainder and the next of kin, and one of the executors had died, and none of their personal representatives were before the court, the surviving executor being sole defendant; it was held, in a suit to administer the estate, and for maintenance of the infant plaintiffs, that, notwithstanding the act above cited, the surviving executor did not sufficiently represent the interests of all parties under the will, but that the representatives of the deceased persons, including the other executor, must be before the court. (*Headdon* v. *Emmott*, 22 L. T. 166.

The 44th section provides, that in any suit or other proceeding before the court, the court may proceed in the absence of the legal personal representative of any deceased person who was interested in the matters in question, or may appoint a person to represent such person's estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the court shall think fit, either specially or generally, by public advertisements; and the estate of such deceased person shall be bound as if a duly constituted legal personal representative of such deceased

person had been a party to the suit or proceeding, and had appeared and submitted his rights and interests to the protection of the court.

The cases which have been decided under this section will be found noticed under the head of "*The hearing of the Cause and the Decree thereon.*"

Under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both. (*Minn* v. *Stant*, 15 Beav. 129.)

The 49th section provides, that no suit shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but that wherever it shall appear to the court that notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of them, or the existence of some ground of defence affecting some or one of them, the plaintiffs, or some or one of them, are or is entitled to relief, the court may grant such relief and modify its decree according to the special circumstances of the case, and for that purpose direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, treat any one or more of the plaintiffs as a defendant or defendants in the suit, and the rest as the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff on the record without interest, the court may at the hearing of the cause order it to stand revived as it may appear just, and proceed to a decision of the cause, and give such directions as to costs or otherwise as may appear just and expedient. This section was acted upon where a bill was filed by one member of a company on behalf of himself and all others except the defendants, praying an account against the defendants; it appearing that the interest of some of the persons purported to be represented by the plaintiff differed from his, it was held, that this case was within the 49th section, and that the court could treat the absent plaintiffs as defendants, and a decree was made

for an account, with liberty to certain shareholders to attend the proceedings in chambers. (*Clements* v. *Bowes*, 1 Drew. 684; 22 L. J. 1022.)

Again, by the 51st section, the court may adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will or other instrument, without making the other parties interested parties to the suit, and without requiring the whole trusts and purposes of the instrument to be executed under the direction of the court, or taking the accounts, or ascertaining the particulars or amount of the property; but if the application be fraudulent or collusive, or for some other reason ought not to be entertained, the order may be refused.

In the case of a suit becoming abated or defective, by the 52nd section no bill of revivor or supplement is necessary, but the persons who would, according to the practice of the court before the operation of the act, have been defendants to a bill of revivor or supplement, shall, on being served with an order to revive or supplemental order, to be obtained as of course, thenceforth become parties to the suit, and be bound to enter an appearance thereto, as if served with process to appear to a bill of revivor or supplemental bill filed against them; but any such person, not under disability other than coverture, may within twelve days after such service apply to the court to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill. If, however, a person so served be under any disability other than coverture, the order shall have no effect against that person until twelve days after a guardian ad litem has been appointed. The time for moving or petitioning to discharge the order is fixed by the 43rd General Order, 7th August, 1852, (A). In a suit by one executor against his co-executor to recover a debt due from

the defendant to the testator's estate and to realize the security, the cestuis que trust under the will are not necessary parties. (*Peake* v. *Ledger*, 4 De Gex & S. 137.)

Where a solicitor makes a person a co-plaintiff in a suit without a retainer or sufficient authority, he does so at his own peril, and such person may move to have his name struck out and to make the solicitor pay the costs of the motion; but when the evidence of want of authority is doubtful, his name will be ordered to be struck out, but he must pay the costs of the motion himself. (*Evans* v. *Kinsey*, 21 L. T. 178.)

As the other modifications of the rule as to parties are more applicable to suits which, under the General Orders of the 22nd April, 1850, and the act 15 & 16 Vict. c. 86, may, with or without the sanction of the court, as the case may be, be commenced by claim, and by the still newer proceeding of summons before the chamber judges, they will be noticed under their respective heads.

THE BILL OR INFORMATION.

The proceeding by information is in these pages considered to be included in the proceeding by Bill, it having been by the recent legislation on the subject so treated, and particularly as that legislation does not, as neither do the Orders consequent thereon, vary the practice relating to informations except as it is varied under the word "Bill," which, according to the interpretation clause of the 15 & 16 Vict. c. 86, means also and includes "Information," and except as it is also varied as shown by the remarks here offered. There will not therefore here be found a distinct heading to the subject of an information, the practice relating to that form of proceeding being similar to that of a suit by bill, with the few variations that existed before the operation of the new acts, and which still exist. The information is prepared and signed by counsel in the same manner as a bill, but it must receive the sanction of the attorney-general before it can be

filed. For this purpose the solicitor furnishes that officer with a copy of the information and counsel's certificate that the information is proper for the sanction of her majesty's attorney-general. The solicitor must also certify that the relator is competent to pay the costs of the information, and that the printed information intended for filing is a true copy of the draft prepared by counsel. The attorney-general then signs the printed information, after which it may be filed. An information cannot be amended without the sanction of the attorney-general, obtained in the same manner; and if the regulation is not observed, it may be taken off the file. (*Attorney-General* v. *Fellows*, 1 J. & W. 254.) The recent alterations of practice do not appear to affect the rights of the attorney-general in any respect; so that in cases where that officer might have filed informations without a relator, he may still do so. It will be seen (*infra*, p. 10) that an information by a relator cannot be filed without an authority given by the relator to be filed therewith.

The bill intended for filing, instead of being engrossed on parchment, must now be printed on writing royal paper, quarto, in pica type leaded, and interleaved with paper of the same description. (Sect. 1; and 1st General Order 7th August, 1852, (A).) But trifling alterations made in writing before filing, as corrections of names and such matters, are allowed, the bill being still a printed bill within the meaning of the act. (*Yeatman* v. *Moulsey*, 16 Jur. 1004.) Numerical statements need not be in words at length, but may be in figures. (*Anon.*, 9 Hare, App., 83.) But generally dates and sums must be inserted at length. Quotations are exceptions to the rule.

There are but three exceptions to the rule thus laid down for printing bills, and those are pointed out by the 6th section, which allows written copies to be filed in the cases of bills praying for injunctions, writs of ne exeat regno, or intended to make infants wards of court; but in such cases the plaintiff or his solicitor must therewith lodge a personal

undertaking to file a printed bill within fourteen days. This undertaking may be in the following form, and is to be written at the foot of the written bill.

I undertake to file a printed copy of this bill within fourteen days from this time. Dated the —— day of ——, One thousand eight hundred and fifty-four.

A. B.
the above named Plaintiff,
[*or* Plaintiff's Solicitor.]

The printed bill filed in pursuance of this undertaking will be held to have been filed at the time of the filing of the written copy.

A written bill should be filed only in cases of extreme urgency, and where there is not sufficient time for printing the bill, for no costs are to be allowed either as between party and party or solicitor and client for any written bill or copy, even though within one of the exceptions, and whether for filing, for service or for a brief, unless the court, in disposing of the costs of the cause, directs such allowance (2nd General Order, 7th August, 1852, (A)), which it is not likely to do, unless satisfied of the urgency and that there was not time for printing. It does not appear by the act whether such a copy for filing is to be written on parchment or paper, but the practice as now settled is to have it written on paper of the same description as that upon which bills are printed. The written copy also should be interleaved. This copy must bear the filing stamp. (*Lambert* v. *Lomas,* 16 Jur. 1008; 20 L. J. 87; and *Jones* v. *Batten,* 16 Jur. 1059; 20 L. T. 122; 22 L. J. 13; 2 De G., M. & G. 111.) The printed copy afterwards filed does not require a fresh stamp. (*Lambert* v. *Lomas,* 20 L. T. 76; 16 Jur. 1008.) If the printed copy be not filed in conformity with the undertaking, the written copy will be taken off the file as of course by the record and writ clerk at the end of the fourteen days, and the plaintiff or his solicitor, who shall personally have undertaking to file such printed copy, shall pay to the defendant

all costs incurred by him in the suit, such costs to be taxed by the taxing master without order upon production of the record and writ clerk's certificate that such printed copy was not filed pursuant to the undertaking, and to be recoverable as costs ordered to be paid by a party in a suit to another party in a suit are recoverable. (3rd General Order, 7th August, 1852, (A).)

A country solicitor, who is authorized to institute a suit, is justified in employing a London agent, in whose name, as agent, the bill may be filed. (*Solly* v. *Wood*, 16 Beav. 370.)

By the 11th section it is provided, that, before the name of any person shall be used in any suit in this court as next friend of any infant, married woman or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill or information. The form of authority by a next friend is as follows:—

In Chancery.

Between A. B. [the wife of C. D., *or*, an infant under the age of twenty-one years, years, *as the case may be*], by E. F., of ——, Esquire, her next friend .... Plaintiff;
and
G. H. and the said C. D. .... Defendants.

To Mr. I. J., of ——, in the county of ——, solicitor. } Dear Sir.

I hereby authorize and request you to institute this suit on behalf of the above-named A. B., and to use my name as her next friend. Dated this —— day of ——, One thousand eight hundred and fifty-three.

I am,
dear sir,
yours truly,
E. F.
[*address and description.*]

The authority to be given by a relator is substantially similar, differing only to suit the different nature of the case.

A defendant to the suit must not be the next friend of an infant plaintiff. (—— v. ——, 11 Jur. 258.)

If the next friend of a married woman is changed during

the suit, he must not only give his own security for costs incurred, but must find a surety to join him. (*Payne* v. *Little*, 22 L. J. 1037.)

The next friend of a married woman plaintiff being insolvent, and in contempt for non-payment of costs, was discharged from being such next friend without prejudice to the liability already incurred; and all proceedings were stayed until a new and sufficient next friend should be appointed, or the plaintiff should have obtained an order to sue in *formâ pauperis* without a next friend. (*Wilton* v. *Hill*, 2 De G., M. & G. 807.)

A married woman is allowed, if the bill is settled and signed by counsel, without further information, upon an ex parte application, to sue in *formâ pauperis* without a next friend. (*Re Lancaster*, 18 Jur. 229; 23 L. T. 4; *Wellesley* v. *Mornington*, 2 Eq. Rep. 675.)

A next friend of an infant will not be removed, unless the court considers that the infant's interests may be prejudiced by the continuance (*Bedwin* v. *Asprey*, 11 Sim. 530); and on a motion to substitute a new next friend, there must be satisfactory evidence of the circumstances and respectability of the person proposed, even if the substitution is consented to by all parties. (*Harrison* v. *Harrison*, 5 Beav. 130.)

Upon the death of the next friend an order is obtained by the solicitor appointing a new one, which order, in the absence of any peculiarity, is of course. (*Westby* v. *Westby*, 2 Coop. 211.) But if he fails to obtain such an order, the defendant may obtain an order that the court may approve of a new next friend; and four days' notice of the order must be given to the plaintiff's solicitor. (*Glover* v. *Webber*, 12 Sim. 351.)

The bill must contain a narrative, as concise as may be, of the material facts, matters and circumstances on which the plaintiff relies, such narrative to be divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate and distinct statement or allegation, and shall pray specifically for the relief which

the plaintiff may conceive himself entitled to, and also for general relief; but it shall not contain any interrogatories for the examination of the defendant. (15 & 16 Vict. c. 86, s. 10.)

According to the 14th General Order, 7th August, 1852, (A), it may be similar in form to the following, with such variations as the nature and circumstances of each particular case may require :—

Form of Bill.

In Chancery.

John Lee..... Plaintiff;

James Styles and Henry Jones } ..... Defendants.

BILL OF COMPLAINT.

To the Right Honourable Edward Burtenshaw, Baron St. Leonards, of Slaugham, in the county of Sussex, Lord High Chancellor of Great Britain,

Humbly complaining, showeth unto his lordship John Lee, of Bedford Square, in the county of Middlesex, Esq., the above-named plaintiff, as follows :—

1. The defendant James Styles, being seised in fee simple of a farm called Blackacre, in the parish of A., in the county of B., with the appurtenances, did, by an indenture dated the 1st of May, one thousand eight hundred and fifty, and made between the defendant James Styles of the one part, and the plaintiff of the other part, grant and convey the said farm with the appurtenances unto, and to the use of, the plaintiff, his heirs and assigns, subject to a proviso for redemption thereof, in case the defendant James Styles, his heirs, executors, administrators or assigns, should on the 1st of May, one thousand eight hundred and fifty-one, pay to the plaintiff, his executors, administrators or assigns, the sum of five thousand pounds, with interest thereon, at the rate of five pounds per centum per annum, as by the said indenture will appear.

2. The whole of the said sum of five thousand pounds, together with interest thereon at the rate aforesaid, is now due to the plaintiff.

3. The defendant Henry Jones claims to have some charge upon the farm and premises comprised in the said indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants James Styles and Henry Jones, and required them either to pay

the said debt, or else to release the equity of redemption of the premises, but they have refused so to do.

5. The defendants James Styles and Henry Jones pretend that there are some other mortgages, charges or incumbrances affecting the premises, but they refuse to discover the particulars thereof.

6. There are divers valuable oak, elm, and other timber and timber-like trees growing and standing on the farm and lands comprised in the said indenture of mortgage of the first of May, one thousand eight hundred and fifty, which trees and timber are a material part of the plaintiff's said security; and if the same or any of them were felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7. The defendant James Styles, who is in possession of the said farm, has marked for felling a large quantity of the said oak and elm trees and other timber, and he has, by hand bills published on the second December instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees and timber on the said farm.

PRAYER.

The plaintiff prays as follows:—

1. That an account may be taken of what is due for principal and interest on the said mortgage.
2. That the defendants James Styles and Henry Jones may be decreed to pay to the plaintiff the amount which shall be so found due, together with his costs of this suit, by a short day to be appointed for that purpose, or, in default thereof, that the defendants James Styles and Henry Jones, and all persons claiming under them, may be absolutely foreclosed of all right and equity of redemption in or to the said mortgaged premises.
3. That the defendant James Styles may be restrained by the injunction of this honourable court from felling, cutting or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said indenture of mortgage, or any part thereof.
4. That the plaintiff may have such further or other relief as the nature of the case may require.

NAMES OF DEFENDANTS.

The defendants to this bill of complaint are,
James Styles,
Henry Jones.

Y. Y.
[*Name of counsel.*]

NOTE.—This bill is filed by Messrs. A. B. and C. D., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named plaintiff.

The bill, before it will be received for filing, must bear a Chancery Fee Fund stamp of 1*l.*, and must be marked at or near the top with the words "Master of the Rolls" or "Vice-Chancellor ——," naming the Vice-Chancellor before whom the plaintiff desires the cause to be heard, and above the Vice-Chancellor's name must be placed the words "Lord Chancellor." This is required by the 1st Order of 5th May, 1837, and the 2nd Order of 29th October, 1851. In the latter case, the cause is thenceforth, unless removed by some special order of the Lord Chancellor, attached to such Vice-Chancellor's Court. (2nd Order, 29th October, 1851.)

By the 17th General Order, 26th October, 1842, every solicitor of a party suing or defending by a solicitor, shall cause to be endorsed or written upon every writ which he shall sue out, and upon every information, bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions, which he may leave with the clerks of records and writs to be filed, and upon all instructions which he may give to the clerks of records and writs for any appearance or other purpose, his name and place of business, and also (if his place of business shall be more than three miles from the Record and Writ Clerks' Office) another proper place (to be called his address for service) not more than three miles from the said office, where writs, notices, orders, warrants, rules and other documents, proceedings and written communications may be left for him; and where any such solicitor shall only be the agent of any other solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

By the 20th of the same Orders, the above regulation is made applicable to parties suing or defending in person.

The bill is filed at the Record and Writ Clerks' Office.

Although the omission to endorse a writ, as noticed above, does not render it void, the court will so deal with the proceedings, by staying process or otherwise, as to give the defendant the benefit of the order. (*Price* v. *Webb*, 2 Hare, 511; 13 L. J. 50.)

The effect of filing a printed bill is by the 4th section of the 15 & 16 Vict. c. 86, declared to be the same as the filing of a bill and the issuing of a subpœna thereon now have, and by the 2nd section, the writ of subpœna to appear and answer a bill is abolished. The endorsement required by the 3rd section to be put on the copies of the bill for service may be omitted from the bill to be filed, and on the copies for service it may be either printed or written, but it is almost invariably printed.

SERVICE OF COPY BILL.

The plaintiff having filed his bill, must next proceed to serve a copy on the defendant, which copy no doubt, in general practice, will be printed or written, according to the bill filed, but there is nothing to prevent the service of a printed copy, even where the bill filed is written under the provisions of the 6th section. Service, however, of a written copy, in the exceptional cases there referred to, will be good service; but whether printed or written, every copy to be served within the jurisdiction must be indorsed in the form or to the effect following, with such variations as circumstances may require.

Form of Indorsement on Bill of Complaint.

VICTORIA R.

To the within-named defendant C. D., greeting.

We command you ["and every of you," *where there is more than one defendant*], that within eight days after service hereof on you, exclusive of the day of such service, you cause an appearance to be entered for you in our High Court of Chancery to the within bill of complaint of the within-named A. B., and that you observe what our said court shall direct. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

NOTE.—If you fail to comply with the above directions, you will be liable to [be arrested and imprisoned.]*

Appearances are to be entered at the Record and Writ Clerks Office, Chancery Lane, London.

---

* If the defendants are a corporation, instead of the words between brackets, substitute the following, "be distrained by your lands and tenements, goods and chattels, rights and credits, and to such other process as our said court may award."

Every copy for service must be previously stamped by the record and writ clerk, such stamp indicating the filing of the original bill, and the date of such filing. (15 & 16 Vict. c. 86, s. 3.)

Every such copy must also, before it can be stamped by the record and writ clerk, bear a chancery fee fund stamp of 5*s*. The service will be effected in the same manner as a subpœna to appear to and answer a bill might have been served before the operation of the act, with this only difference that the original bill need not, as of course, being on the file of the court it cannot, be produced. (15 & 16 Vict. c. 86, s. 5.) Personal service therefore, though desirable, is not necessary if the defendant is within the jurisdiction.

But liberty is reserved to the court to direct substituted service in such manner and in such cases as it shall think fit. (Ibid.) Where a bill prayed an injunction to restrain an action at law, substituted service was ordered upon the attorney in the action for the plaintiff at law, upon an affidavit that such plaintiff was out of the jurisdiction, and that the person intended to be served was such attorney. (*Sergison* v. *Beavan*, 16 Jur. 1111; 20 L. T. 123.)

An affidavit of merits is not now necessary. (Ibid.)

A general keeping out of the way is considered to be keeping out of the way to avoid service, and an order for substituted service will be made under the 31st of the General Orders of May, 1845. (*The Manchester and Stafford Railway Company* v. *How*, 22 L. J. 1044.)

The ground on which the court orders substituted service is, that there is reasonable expectation that such service will become known to the principal. (*Hope* v. *Hope*, 23 L. T. 182.) And substituted service of a bill on a person in possession of defendant's mortgaged property will not be ordered, without showing some agency of the person in possession on behalf of the defendant; and the 5th section above referred to has not relaxed this rule. (*Bones* v. *Angier*, 23 L. T. 252.)

The service of a printed bill, with the indorsement thereon,

and stamped as directed, will have the same effect as the service of a writ of subpœna would have had before the operation of the act, and will entitle the plaintiff to such remedies for default of appearance and otherwise, as he would have been entitled to before that time, in case of due and proper service of a subpœna to appear to and answer a bill. (15 & 16 Vict. c. 86, s. 4.) For form of affidavit of service, see "*Hearing of Claim*," infra.

By the 6th section, the service of a written copy in the case of a written bill filed for an injunction, writ of ne exeat regno, or to make an infant a ward of court, if duly stamped and indorsed, will have the same effect as the service of a printed copy.

The practice as to service of a copy of the bill, omitting the interrogating part thereof, on a defendant (not being an infant), against whom no direct relief is sought, and who is not therefore required to appear or take any active part in the suit, but is simply to be bound by the proceedings in the cause, and which practice is regulated by the 23rd, 24th, 25th, 26th, 27th, 28th and 29th of the General Orders of the 26th of August, 1841, and the 28th of the General Orders of the 8th of May, 1845, does not appear to be at all disturbed by the new acts and orders, although that practice may be considered superseded by the recent alterations. It may be that a defendant, served with a copy of the bill, is not required to appear. This must be determined by reference to the copy bill so served, which, if any appearance is required, will bear the indorsement before mentioned, and the stamp of the Record and Writ Clerks' Office. If not bearing either of these requisites, no appearance can be enforced. Besides the absence of these particulars, if it is desired merely to bind a defendant by all the proceedings in the cause, without his appearance or answer, that desire will appear in the bill itself. The absence of the interrogatories in the copy served will not be any guide on this point, as all bills are now filed without any interrogatories, except

perhaps in the cases of amended bills, the originals of which were filed before the operation of the acts.

A defendant out of the jurisdiction of the court may, under the 33rd Order of May, 1845, be rendered amenable to process. Under that order, the court had formerly to direct service on the absent defendant of the subpœna, which process being now abolished, it became necessary to alter the form of order for carrying out the object of the general order of the court. The order now made gives leave to serve a defendant out of the jurisdiction with a copy of the bill, and directs his appearance thereto within a time to be mentioned in the order. The copy served should bear an indorsement to the effect of the order of the court. Such indorsement, if printed, may be altered in writing, by inserting, instead of eight days, such other time as may be fixed by the court. (*Sharpe* v. *Blondeau*, 20 L. J. 154; *Chatfield* v. *Berchtolott*, 20 L. T. 204.)

It has already been observed that a provision is made by the 5th section of the act for the case of a defendant not being found, the court being at liberty to direct substituted service of a printed bill in such manner and in such cases as it shall think fit.

If the defendant is a *peer*, a petition of course is presented to the Lord Chancellor for a letter missive, which, when granted, is served on the defendant, together with a copy of the petition and an authenticated copy of the bill, which last should not bear the indorsement used for other defendants. If, however, he neglects to appear within the proper time, he may then be served with a copy indorsed as in the case of a defendant not privileged.

If the defendant is a *member of the House of Commons*, he may be served as an ordinary defendant.

If the defendants are a *corporation*, a copy bill, indorsed and stamped, is to be served on the proper officer or member of the body. As to this, the following provisions are a guide:— The 8 Vict. c. 16, s. 135 (The Companies Clauses Consolidation Act, 1845), provides, that any summons or

notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company. This applies to every joint stock company incorporated by any act passed after this act. The 8 Vict. c. 18, s. 134 (The Lands Clauses Consolidation Act, 1845), provides, that any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the promoter of the undertaking, may be served by the same being left at or transmitted through the post, directed to the principal office of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given or transmitted through the post, directed to the secretary, or in case there shall be no secretary, the solicitor of the said promoters. This applies to every undertaking authorized by any act passed after this act, and which shall authorize the purchase or taking of lands for such undertaking. The 8 Vict. c. 20, s. 138 (The Railways Clauses Consolidation Act, 1845), provides, that any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company. This applies to every railway after this act authorized to be constructed.

If the defendant is an *infant*, his parent or guardian, or person with whom or under whose care he is residing, should be served.

A *married woman* is served by serving the husband where the suit does not relate to separate estate of the wife; and

an affidavit of service upon the husband and wife should state that the service was made on the husband and wife by serving the husband. (*Steel* v. *Parsons*, 8 Jur. 641.)

DEFENDANT NOT APPEARING.

If the defendant, being required to appear, should not do so within eight days from the time of his being served within the jurisdiction of the court with a printed copy of the bill, or with a written copy if the case falls within the 6th section of the act, the plaintiff may procure an attachment against his person as before (*Collins* v. *Brown*, 1 Hare, 315.) For mode of proceeding, see infra, "Process of Contempt." Or he may (as is most usual) enter an appearance for him under the 29th of the General Orders of the 8th May, 1845, provided such defendant is not an infant, or a person of weak or unsound mind, unable of himself to defend the suit. By that order it is provided, that if any defendant, not appearing to be an infant or a person of weak or unsound mind unable of himself to defend the suit, is, when within the jurisdiction of the court, duly served with a subpœna to appear to or to appear to and answer a bill, and refuses or neglects to appear thereto within eight days after such service, the plaintiff may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the record and writ clerk to enter an appearance for such defendant; and, no appearance having been entered, the record and writ clerk is to enter such appearance accordingly, upon being satisfied, by affidavit, that the subpœna was duly served upon such defendant personally or at his dwelling-house or usual place of abode; and after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the record and writ clerk is not hereby required to enter such appearance, the plaintiff may apply to the court for leave to enter such appearance for such defendant; and the court, being satisfied that the subpœna was duly served, and that no appearance has been

entered for such defendant, may, if it so thinks fit, order the same accordingly. This course may also be taken in the case of an amended bill. (*Firth* v. *Hopkins*, 2 Yo. & Coll. 530.) If an appearance is entered by a plaintiff for a defendant, an infant or person of unsound mind unable of himself to defend the suit, it is irregular and of no validity (30th Order.) An affidavit of service of the copy bill must be taken to the record and writ clerk, together with a præcipe for an appearance (the printed form stamped with a 7*s*. stamp if not more than three defendants, and an additional 7*s*. for every additional number of three.) The record and writ clerk will then, if all is regular as to time and service, and the affidavit sufficient (see 34th ibid.), enter the appearance. Notice of this appearance should be given to the defendants.

If the defendant be under disability, the 32nd of those Orders may be resorted to by plaintiff for the appointment of a guardian ad litem. That order provides that, if, upon default made by a defendant in not appearing to or not answering a bill, it appears to the court that such defendant is an infant, or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the court may, upon the application of the plaintiff, order that one of the solicitors of the court be assigned guardian of such defendant, by whom he may appear to and answer or may answer the bill and defend the suit; but no such order is to be made, unless it appears to the court, on the hearing of such application, that the subpœna to appear to and answer the bill was duly served, and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the bill, and at least six days before the hearing of the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such subpœna, and (in the case of such defendant being an infant not residing with or under the care of his father or guardian) that notice of such application was also

served upon or left at the dwelling-house of the father or guardian of such infant, unless the court, at the time of hearing such application, thinks fit to dispense with such last-mentioned service.

The plaintiff cannot, under the 32nd Order of May, 1845, apply for a guardian ad litem to be assigned to a defendant of unsound mind not found so by inquisition, for default of answer, such defendant having on the last day for putting in the answer obtained from the master an order for two months further time to answer, and then, by petition at the Rolls, an order for liberty to sue out a commission for such guardian. Such application of the plaintiff was refused with costs. (*Saunders* v. *Walter*, 19 L. J. 409; 2 Hall & Twells, 199.) The application for a guardian to an infant defendant of unsound mind should be to the court and not to the jurisdiction in lunacy. (*Pidcock* v. *Boultbee*, 2 De G. M. & G. 898; 22 L. J. 611.)

The court would not appoint as guardian ad litem the solicitor of a trustee defendant who, from age and infirmity, was incapable of transacting business. (*Patrick* v. *Andrews*, 22 L. J. 240.)

By the 6th General Order, 1st June, 1854, guardians ad litem appointed for infants, or persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, are to be appointed in like manner as guardians ad litem to answer and defend are now appointed in suits on bills filed.

By the 7th of the same Orders, it is provided, that at any time during the proceedings, at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian ad litem to be appointed for any infant, or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order.

The requisitions of the 32nd Order must be strictly complied with, as to service of the copy bill and notice of the

application, unless the court thinks fit to dispense with the service on the father or guardian of the notice of motion. As to the application of this and the 33rd orders, where the service is effected abroad, see *Anderson* v. *Stather* (10 Jur. 383); *Biddulph* v. *Lord Camoys*, 7 Beav. 580; 10 Jur. 485.) The infant's father being dead, service of notice at the house of the mother and her second husband, with whom the infants were residing, was sufficient. (*Hitch* v. *Wells*, 8 Beav. 576.) It is not sufficient to show that the notice was served on an infant defendant, who was articled to and residing with a surgeon, whilst so residing, without showing that the service was either personal, or at the surgeon's dwelling-house. (*Taylor* v. *Ansley*, 9 Jur. 1055.) But where an infant has appeared by his solicitor, the notice is sufficiently served upon the solicitor. (*Cookson* v. *Lee*, 15 Sim. 302.)

The solicitor to the Suitors' Fund, and not the plaintiff's solicitor, should be assigned the guardian ad litem. (*Sheppard* v. *Harris*, 15 L. J. 104; 10 Jur. 24; see also *Biddulph* v. *Lord Camoys*, 9 Beav. 548.)

It is not necessary, in order to obtain an order appointing the solicitor to the Suitors' Fee Fund the guardian ad litem, that the infant should be in default for not appearing or answering, where he is not required to answer the bill. (*Bentley* v. *Robinson*, 9 Hare, App., 76.)

On the death of the guardian there must be a special application for the appointment of a new guardian. *Needham* v. *Smith*, 6 Beav. 130.)

The 28th of the Orders of the 26th October, 1842, provides, that where a solicitor is appointed guardian his costs shall be borne and paid by the parties to the suit, or one or more of them, or out of any fund in court in which the infant or person of unsound mind may be interested, as the court may direct, and the court may direct their repayment or allowance as the justice and circumstances of the case may require. The costs were ordered to be paid by the plaintiff in the following cases: *Robinson* v. *Aston*, 9 Jur. 224; *Harris* v. *Hamlyn*, 18 L. J. 403.

The 31st and 33rd of the Orders of 8th May, 1845, providing means to a plaintiff for entering an appearance for a defendant who is out of the jurisdiction, or not to be found, are framed entirely upon the supposition of a subpœna to appear to or to appear to and answer the bill being issued; and although subpœnas to appear to and answer are abolished, and there does not appear in either of the new acts any express provision for extending the benefit of these particular orders to the new practice of the court, yet the 4th section of the act (15 & 16 Vict. c. 86) enacts, that the filing of a printed bill shall have the same effect as the filing of a bill and the issuing of a subpœna thereon had before the operation of the act; therefore, as the orders in question refer to defendants against whom a subpœna has issued, and the section just mentioned assumes a subpœna to have been issued in all cases where only a printed bill has been filed, these orders may be said to apply to the new practice.

The 31st Order provides, that, in case it appears to the court, by sufficient evidence, that any defendant, against whom a subpœna to appear to or to appear to and answer a bill has issued, has been within the jurisdiction of the court, at some time not more than two years before the subpœna was issued, and that such defendant is beyond the seas, or that upon inquiry at his usual place of abode (if he had any), or at any other place or places where, at the time when the subpœna was issued, he might probably have been met with, he could not be found, so as to be served with process, and that, in either case, there is just ground to believe that such defendant is gone out of the realm, or otherwise absconded to avoid being served with process, then and in such case, the court may order that such defendant do appear at a certain day to be named in the order; and a copy of such order, together with a notice thereof to the effect set forth at the foot of this order, may, within fourteen days after such order made, be inserted in the *London Gazette*, and be otherwise published as the court directs; and in case

the defendant does not appear within the time limited by such order, or within such further time as the court appoints, then, on proof made of such publication as aforesaid of the aforesaid order, the court may order an appearance to be entered for the defendant on the application of the plaintiff.

NOTICE—A. B., take notice, that if you do not appear pursuant to the above order, the plaintiff may enter an appearance for you, and the court may afterwards grant to the plaintiff such relief as he may appear to be entitled to on his own showing.

The 33rd Order provides, that, where a defendant in any suit is out of the jurisdiction of the court,—

1. The court, upon application supported by such evidence as shall satisfy the court in what place or country such defendant is or may probably be found, may order that the subpœna to appear to or to appear to and answer the bill may be served on such defendant in such place or country or within such limits as the court thinks fit to direct.

2. Such order is to limit a time (depending on the place or country within which the subpœna is to be served) after service of the subpœna within which such defendant is to appear to the bill, and also (if an answer be required) a time within which such defendant is to plead, answer, or demur, or obtain from the court further time to make his defence to the bill.

3. At the time when such subpœna shall be served, the plaintiff is also to cause such defendant to be served with a copy of the bill, and a copy of the order giving the plaintiff leave to serve the subpœna.

4. And if, upon the expiration of the time for appearing, it appears to the satisfaction of the court that such defendant was duly served with the subpœna, and with a copy of the bill and a copy of the order, the court may, upon the application of the plaintiff, order an appearance to be entered for such defendant.

The defendant was held to have absconded within the

meaning of the 31st Order, he having gone abroad after notice that a bill would be filed, but before it was filed. (*Cope* v. *Russell*, 2 Phil. 404; 12 Jur. 105.)

When the three weeks mentioned in the 29th Order have been allowed to expire without an appearance being entered by or for the defendant, or, under any other special circumstances, a special order must be obtained on an ex parte application by motion, and supported by an affidavit of service of copy bill and the record and writ clerk's certificate of no appearance entered, unless the affidavit states the fact. (*Tatham* v. *Williams*, 1 Hare, 159; *Tendall* v. *Burch*, 6 Jur. 49.) Upon this order being drawn up, passed and entered, the record and writ clerk will, on its production to him, together with the usual præcipe for an appearance, enter the appearance accordingly.

The service of a copy of the bill being now equivalent to the service of a subpœna to appear, the cases decided under the former practice may be applied to the new practice. The application for a special order must be made within a reasonable time after service of the copy bill, otherwise the court may refuse the order, except upon notice to be served on the defendant. (*Radford* v. *Roberts*, 2 Hare, 96; 6 Jur. 1080. See also *Bointon* v. *Parkinson*, 12 L. J. 377; 7 Jur. 367; where a qualified order was made;—and *Devenish* v. *Devenish*, 7 Jur. 841, where notice of the motion was required to be served.) Or the court may require a fresh service of copy bill. (*Walker* v. *Hirst*, 13 Sim. 490; 15 L. J. 72; 9 Jur. 1002.)

If the defendant is abroad, and a copy of an amended bill is served upon the solicitor, the plaintiff may still, by analogy to the former practice, avail himself of the order in question. (*Zulueta* v. *Vinent*, 3 M'N. & G. 246; 20 L. J. 474; 15 Jur. 277; overruling *Marquis of Hertford* v. *Suisse*, 13 Sim. 489; and *Sewell* v. *Godden*, 1 De G. & S. 126; 16 L. J. 181; 11 Jur. 260.)

As to the plaintiff's costs of entering an appearance for a defendant, the 35th of the Orders of May, 1845, declares him entitled, as against the defendant, to the costs of and incident to that step, whatever may be the event of the suit; and such costs are to be added to any costs which he may be entitled to receive from the defendant, or set-off against any costs he may be ordered to pay the defendant; but payment thereof is not to be otherwise enforced without the leave of the court.

As appears, infra, under "*Proceedings for Defendants by Bill,*" a defendant may enter an appearance for himself after an appearance has been entered for him by the plaintiff, but without prejudice to the plaintiff. (36th G. O., May, 1845.)

By the 12th sect. of the 1 Will. IV. c. 36, if a defendant, having the privilege of parliament, neglect to appear on return of process of sequestration, an appearance may, on production of the return, be ordered to be entered for him, and such proceedings may be thereupon had as if he had actually appeared. This provision would appear to be no longer of service, as with regard to members of the House of Commons, who are served as other defendants, the Orders of May, 1845, furnish an easier remedy; and as to peers, those Orders may be considered to extend to that class of defendants. In the case of a peer the course would be as follows:—The defendant is served with a letter missive, a copy of the petition on which such letter is granted, and an authenticated copy of the bill, without the usual indorsement. If he does not appear in pursuance of the letter, he may then be served with a copy of the bill with the usual indorsement upon it, requiring him to appear within the usual time. If he fails to do this, then, upon an affidavit of the services, the appearance may be entered for the defendant at the plaintiff's instance.

An appearance may also be entered by the plaintiff for a corporation, after due service and default made, upon an affidavit of service.

DELIVERY OF COPIES OF BILL.

In the event of the defendant appearing, either by himself or his solicitor, within eight days after service of the printed copy bill; or in the case of the plaintiff entering an appearance for him under any of the foregoing orders which he may be able to avail himself of, and whether the defendant has or has not afterwards entered an appearance for himself under the 36th of the General Orders of the 8th of May, 1845; or in the event of his entering such appearance under the 26th of the General Orders of the 26th of August, 1841, on being served with a copy of the bill under the 23rd General Order of August, 1841, desiring the suit to be prosecuted against him in the ordinary way, the plaintiff will next have to deliver to the defendant or his solicitor, on application for the same (which in all probability will now be made), such a number of printed copies of the bill as the defendant may require, he paying for them at the rate of a halfpenny per folio. (15 & 16 Vict. c. 86, s. 7; 5th General Orders of 7th August, 1852, (A).) But no defendant shall be at liberty to demand from the plaintiff more than ten printed copies. (6th General Orders, 7th August, 1852, (A).)

DEFENDANT DEMURRING.

If the defendant should demur alone to the bill, he must still do so within twelve days after appearance (15 & 16 Vict. c. 86, s. 13; and whether the demurrer be general or special, that is to say, to the whole or to part of the bill, the plaintiff must proceed to set it down for argument, having regard to whether it be to the whole or to part only of the bill, within the times allowed by the 17th and 18th articles of the 16th of the General Orders of 8th May, 1845, otherwise he will be held to have submitted thereto; and if neither the demurrer is set down nor an order for leave to amend served within such times respectively, the demurrer will, under the 46th and 47th of the same Orders, be held suffi-

cient as if it had been allowed upon argument, and the plaintiff must pay the demurring parties costs accordingly, as mentioned in the 45th Order. The times of vacation are not to be reckoned for setting down demurrers. (14th G. O., 8th May, 1845, Art. 3.) The practice of entering a demurrer or plea with the registrar is abolished by the 44th Order. If the plaintiff, submitting to the demurrer, serves an order to amend, he must pay the defendant 20*s*. costs. But after the demurrer is set down the costs are taxed costs.

As to mode of setting down and other matters relating to a demurrer, see infra, "*Proceedings for Defendants to Bill.*"

DEFENDANT PLEADING.

A defendant who is not required to answer must, if he desire to plead to the bill, do so within twelve days after appearance (15 & 16 Vict. c. 86, s. 13); but if the plaintiff require an answer from him he may put in his plea, answer or demurrer, not demurring alone, within fourteen days from the delivery to him or his solicitor of a copy of the interrogatories which he is to answer (19th General Order, 7th August, 1852, (A)); and in either case the plaintiff must, whether the plea be to the whole or part of the bill, within the three weeks allowed by the 19th article of the 16th General Order of the 8th May, 1845, either set it down for argument, or serve an order for leave to amend the bill, or undertake to reply thereto pursuant to the 49th of those Orders. The times of vacation are not to be reckoned for setting down pleas. (14th G. O., 8th May, 1845, Art. 3.)

If the plea is not set down for argument, or an order for leave to amend served by plaintiff, or the plaintiff does not by notice in writing undertake to reply to the plea within three weeks after the filing of the plea, it will, under the 49th Order, be held good as if allowed upon argument, and the plaintiff must pay the defendant's costs accordingly, as directed by the 48th Order; and the 50th Order protects the

defendant who has pleaded to the whole bill from any proceeding by a plaintiff who has undertaken to reply to such plea, without the special leave of the court. If the order to amend be served within the three weeks the costs payable by the plaintiff to the defendant are 20*s*. But after the plea is set down the costs are taxed costs. A plea to the whole of the relief and to part of the discovery is not a plea to the whole bill within the meaning of the 49th Order above referred to. (*Neck* v. *Gains*, 11 Jur. 763.)

As to mode of setting down and other matters relating to a plea, see infra, "*Proceedings for Defendants to Bill.*"

A plaintiff undertaking to reply to a plea to the whole bill must file his replication within four weeks after the date of his undertaking, otherwise the defendant may move to dismiss the bill for want of prosecution, with costs. (114th G. O., 8th May, 1845, Art. 2.)

Replication being filed, the other proceedings for examining witnesses and bringing on the cause to a hearing, on the point at issue, will be taken as in other cases.

If at the hearing the plea proves to be false, the plaintiff is entitled to a decree, and if he requires discovery he may examine the defendant. (*Wood* v. *Strickland*, 2 V. & B. 158.)

PLAINTIFF'S INTERROGATORIES.

In the absence of a plea or demurrer, the plaintiff, if he desires an answer from the defendant and does not feel himself in a position to move for an injunction or a receiver, if prayed for, or to make any other urgent application to the court, will next proceed to prepare interrogatories for the examination of the defendant. The interrogatories, in practice, are almost always prepared by counsel, and sometimes when he settles the bill should be signed by him. They need not be printed, but should be written on unstamped parchment. The plaintiff may file his interrogatories for the exa-

mination of such defendants or defendant as he shall require an answer from within eight days after the time limited for the appearance of such defendants or defendant (15 & 16 Vict. c. 86, s. 12; 16th G. O., 7th August, 1852, (A)), and deliver to them or him, or their or his solicitors or solicitor, a copy of such interrogatories, or of such of them as shall be applicable to the particular defendants or defendant, within eight days after the time allowed for appearance, if the defendant appear in person or by his solicitor within the time limited; or if he do not so appear within the time limited, then at any time after the time allowed for appearance, but before appearance entered, or within eight days after such appearance if entered after the time so allowed. (15 & 16 Vict. c. 86, s. 12; 17th & 18th G. O., 7th August, 1852, (A).) The court may extend the time when it thinks fit.

The copy to be delivered is written on paper. It must be examined with the original and the number of folios counted by the record and writ clerks, who, on finding that the copy is duly stamped and properly written, are to mark the same as an office copy. (Ibid.) Each copy or part of a copy so examined must bear a 5*s.* stamp.

Leaving an office copy of the interrogatories at the office of the defendant's solicitor was considered not sufficient (*Bowen* v. *Price*, 1 Drewry, 307), but the Lords Justices, reversing this decision, held that it was. (22 L. J. 179.)

Leave was given to file interrogatories, although a printed bill had not yet been filed, where a written one praying an injunction was filed and the defendant had appeared. (*Lambert* v. *Lomas*, 20 L. T. 76; 16 Jur. 1008.)

The printed copy, when filed after a written copy, does not require a fresh stamp. (Ibid.)

When one solicitor appears for several defendants it seems that only one copy of the interrogatories need be served on him for all such defendants, provided the note at foot is sufficiently explicit.

The form of the interrogatories may be similar to the fol-

lowing, with such variations as the nature and circumstances of each particular case may require. (15th G. O., 7th August, 1852, (A).)

Form of Interrogatories.

In Chancery.

John Lee ..... Plaintiff;

James Styles and Henry Jones ..... Defendants.

Interrogatories for the examination of the above-named defendants in answer to the plaintiff's bill of complaint.

1. Does not the defendant Henry Jones claim to have some charge upon the farm and premises comprised in the indenture of mortgage of the first of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned?

2. What are the particulars of such charge, if any, the date, nature and short effect of the security, and what is due thereon?

3. Are there or is there any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any and what manner affecting the aforesaid premises, or any part thereof?

4. Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date, nature and short effect of the security; what is now due thereon; and who is or are entitled thereto respectively; and when and by whom, and in what manner, every such mortgage, charge or incumbrance was created.

The defendant James Styles is required to answer all these interrogatories.

The defendant Henry Jones is required to answer the interrogatories numbered 1 and 2.

Y. Y.
[*name of counsel.*]

Interrogatories cannot be filed after the times above specified without special leave of the court granted upon notice of motion. (20th G. O., 7th August, 1852, (A).)

For a form of affidavit of service of interrogatories, see infra, "*Proceedings for Defendants to Claim.*"

DEFENDANT NOT ANSWERING.

Unless the defendant puts in his plea, answer, or demurrer, not demurring alone (the time for demurring alone being limited to twelve days after appearance), or obtains further

time to do so, the plaintiff may proceed to attach for want of answer after the expiration of fourteen days from the delivery to him or his solicitor of a copy of the interrogatories which he is to answer (19th G. O., 7th August, 1852, (A)), that being the time allowed to a defendant without order; or he may file a traversing note, or proceed to take the bill pro confesso; for particular directions as to which, see the several proceedings in "*Process of Contempt*" and "*Traversing Note,*" noticed infra.

EXCEPTIONS TO PLEADINGS, &c., FOR SCANDAL OR INSUFFICIENCY.

The most frequent proceeding under this heading is that of taking exceptions to an answer for insufficiency, which, when done, are taken under the advice of counsel, before whom the pleadings are laid on the coming in of the answer. The exceptions, whether for scandal or insufficiency, are drawn and signed by counsel, fair copied on unstamped paper, usually foolscap, bookwise, and filed with the record and writ clerk to whose division the cause belongs. The name and address of the solicitor and agent, if any, filing them, or of the party, if in person, must be endorsed, and notice of filing must be served on the opposite solicitor the same day, as required by the 12th Order, hereinafter referred to. Formal answers, such as those of infants and persons of unsound mind, filed by their guardians, are not open to exception. (*Lucas* v. *Lucas*, 13 Ves. 274; *Micklethwaite* v. *Atkinson*, 1 Coll. 173.) Neither are voluntary answers open to exception, not being intended to give discovery to the plaintiff. Upon this principle a supplemental answer, filed by special leave of the court, at the defendant's instance, cannot be excepted to. (*Barnes* v. *Tweddle*, 10 Sim. 481.) It has been held that, where there is an answer to a part and a plea to the residue, the answer cannot be excepted to until after the plea is argued, and an order obtained that it shall stand for an answer with liberty to

except. (*Darnel* v. *Reyny*, 1 Vern. 344.) In such a case the time for excepting runs from the time when the plea is overruled. (*Esdaile* v. *Molyneux*, 2 Coll. 641; 16 L. J. 68; 11 Jur. 201.)

Though an answer is technically insufficient, yet the court is bound to consider what object the plaintiff would gain by a more full answer, and there not being any allegation that anything was fraudulently or erroneously inserted in or omitted from the accounts, the court, not seeing any advantage in calling for a further answer, overruled the exception. (*White* v. *Barker*, 5 De G. & S. 746; 17 Jur. 174.) Exceptions for insufficiency as to books and papers are now generally discouraged. (*Law* v. *The London Indisputable Life Policy Company*, 10 Hare, App., 20.)

A defendant having refused to answer certain interrogatories on the ground that it would subject him to the penalties of the Stock Jobbing Act, it was held, that there being no penalty for answering the interrogatories, he could not refuse to answer on the ground that the transactions were illegal, or that, if legal, the remedy was at law. (*Williams* v. *Trye*, 23 L. T. 72.)

The court will, in all cases, discountenance the practice of excepting for insufficiency to answers not answering interrogatories as to documents; for although a bill does not contain a charge that defendant has documents in his possession or power, yet the plaintiff may file interrogatories for the examination of the defendant on that point. (*Perry* v. *Turpin*, 23 L. T. 87.)

By the 13 & 14 Vict. c. 35, s. 27, it was enacted, that all exceptions for scandal, impertinence (now abolished), and insufficiency, which, according to the then existing practice of the court, were referred to the masters of the court, should not any longer be so referred, but should be heard and determined by the court in the first instance. It would, however, appear from the case of *Coyle* v. *Alleyne* (14 Beav. 171), that the old right of obtaining an order of course, as pointed out by the General Order of 23 February, 1850, still exists.

Exceptions should specify not only the cause, but also the bill to which the answer excepted to was filed. (*Lichfield* v. *Bond*, 5 Beav. 513; 12 L. J. 88.) Where an exception to an answer designated the interrogatory by number, and then set it forth under a videlicet, a slight variance in the setting out of the interrogatory was held to be immaterial. (*Esdaile* v. *Molyneux*, 11 Jur. 323.)

The times of vacation are not to be reckoned in the computation of the time allowed for filing or setting down exceptions for scandal, impertinence (*a*) or insufficiency, in cases where the time is not limited by notice given pursuant to the 13th of these orders. (4th G. O., 2nd Nov. 1850.)

No order is to be made for *leave to file exceptions nunc pro tunc.* (6th ibid.) But it seems that the court will sometimes direct exceptions to be filed after the expiration of the time allowed. (*Biddulph* v. *Lord Camoys*, 9 Beav. 155; see also *Whitmore* v. *Sloane*, 9 Beav. 1; 15 L. J. 104.

A defendant, whose answer is not excepted to or set down for hearing on former exceptions, *alleging that the plaintiff is prosecuting him in this court and also at law* for the same matter, *may*, upon the expiration of eight days after his answer, or further answer, is filed, *obtain* as of course, on motion or petition, *the usual order for the plaintiff to make his election* in which court he will proceed. 7th G. O., 2nd Nov. 1850.)

After the filing of a defendant's answer, *the plaintiff has six weeks within which he may file exceptions* thereto for insufficiency.

If he does not file exceptions within six weeks, such answer on the expiration of the six weeks is to be deemed sufficient. (8th ibid.)

But if the plaintiff before the expiration of the six weeks obtains and serves an order to amend his bill without saving

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(*a*) Exceptions for impertinence are now abolished. (15 & 16 Vict. c. 86, s. 17.)

his right to except, that right is gone. (*De la Torre* v. *Bernales*, 4 Madd. 396.) The same time is allowed for excepting to an answer to an amended bill as to an answer to an original bill, although it be also a further answer to the original bill. (*Lloyd* v. *Clark*, 7 Jur. 568.) And when the defendant was in contempt, the time for excepting runs from the filing of the answer, and not from the time when the costs of the contempt are paid. (*Coyle* v. *Alleyne*, 16 Beav. 548.)

A defendant, *desiring to prevent exceptions to* his answer for insufficiency *being set down for hearing*, has for that purpose only eight days after the filing of such exceptions within which he may *submit* to the same. (9th G. O., 2nd Nov. 1850.)

A notice of submission should be served upon the plaintiff's solicitor.

If a defendant not being in contempt *submits* to exceptions to his answer for insufficiency before the plaintiff has set them down for hearing, he is allowed three weeks from the date of the submission within which he is to put in his further answer to the bill. (10th ibid.)

A defendant submitting generally to exceptions need not in his second answer re-answer interrogatories already sufficiently answered in the first answer. (*Robinson* v. *Anderson*, 2 Eq. Rep. 89.)

The plaintiff having filed exceptions for insufficiency to a defendant's answer is *not to set them down for hearing* before the expiration of eight days from the filing of such exceptions, *unless* in a case of election he is required by notice in writing from such defendant to set them down in four days pursuant to the 13th of these orders, or in a case where the common injunction (*b*) may be obtained or retained on the allowance of such exceptions. (11th G. O., 2nd Nov. 1850.)

Exceptions to answers for insufficiency, or to any plead-

(*b*) The common injunction is now abolished, and the practice

ing or other matter depending before the court for scandal or impertinence (*c*), or for scandal and impertinence, *are to be set down for hearing* by the registrar at the request of the party filing the same upon the production of a certificate of the clerk of records and writs of the filing of such exceptions; or (in the case of exceptions to an answer for insufficiency) of the filing of a further answer, and the same are to be advanced and put in the paper for hearing on an early day, and the party setting down any such exceptions shall on the day on which the same shall be so set down serve a notice thereof on the party whose pleading or other matter is excepted to, otherwise the said exceptions shall be deemed not set down. (12th ibid.)

No deposit is payable on these exceptions, as in the case of a master's report. The notice must be served before eight o'clock in the evening, otherwise it will be deemed to have been served on the next following day, excluding Sundays. (22 G. O., 26th Oct. 1852.)

A defendant, whose answer is excepted to, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may by notice in writing require the plaintiff to set down the exceptions within four days from the service of the notice.

And if the plaintiff does not set down such exceptions within such four days, such defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which court he will proceed. (13th G. O., 2nd Nov. 1850.)

The plaintiff having filed exceptions for insufficiency to a defendant's answer is to set them down for hearing after the

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with respect to injunctions to stay proceedings at law is assimilated to that respecting special injunctions generally. (15 & 16 Vict. c. 86, s. 58.)

(*c*) Exceptions for impertinence are now abolished. (15 & 16 Vict. c. 86, s. 17.)

expiration of eight days, but within fourteen days from the filing of such exceptions.

If he does not, the answer on the expiration of such fourteen days is to be deemed sufficient. (14th ibid.)

The plaintiff, *having shown exceptions to a* defendant's answer *for insufficiency as cause against dissolving an injunction*, is to *set down such exceptions for hearing* at the latest on the day next after showing such exceptions as cause.

If he does not, the injunction is dissolved. (15th ibid.)

After the filing of exceptions to a defendant's answer *for insufficiency, and any further answer put in*, the plaintiff has *fourteen days* from the filing of such further answer *within which he may set down the old exceptions.*

If the old exceptions be not set down within fourteen days after such further answer put in, the answer is on the expiration of such fourteen days to be deemed sufficient. (16th ibid.)

After exceptions to an answer *for insufficiency are set down for hearing*, if a defendant not being in contempt *submits to answer*, or the court *holds the answer to be insufficient*, the court may in such cases appoint the time within which such defendant is to put in his further answer.

If such defendant does not obtain time from the court, or does not answer within the time which the court allows, the plaintiff may sue out process of contempt against such defendant. (17th ibid.)

The *answer* of a defendant *is to be deemed sufficient*—

1. If no exception for insufficiency be filed thereto within six weeks after the filing of such answer.

2. If exceptions being filed the plaintiff does not set them down for hearing within fourteen days after the filing thereof.

3. If within fourteen days after the filing of a further answer, the plaintiff does not set down the old exceptions. (18th ibid.)

If *after* a defendant's *second or third answer* is filed the *plaintiff sets down the old exceptions for insufficiency*, then the particular exception or exceptions to which he requires a further answer is or are to be stated in the notice of setting down such exceptions. (19th ibid.)

If *upon the hearing of exceptions the answer be held sufficient*, it shall be deemed to be so from the date of the order made on the hearing; and if the defendant submit to answer without an order from the court, the answer shall be deemed insufficient from the date of the submission. (20th ibid.)

The court *holding a first or second answer to be insufficient*, may appoint the time within which a defendant, who is not in contempt, is to file a further answer. (21st ibid.)

Upon a third answer being held to be insufficient, the court may order the defendant *to be examined upon interrogatories* to the points held to be insufficient, and *to stand committed* until he shall have perfectly answered the interrogatories; and the defendant is to pay such *costs* as the court shall think fit to award. (22nd ibid.)

No pleading or other matter depending before the court *is to be set down for hearing for scandal* or impertinence (*d*), *unless exceptions are taken* in writing and signed by counsel describing the particular passages which are alleged to be scandalous or impertinent. (23rd ibid.)

Where any person or party having filed exceptions to any pleading or other matter depending before the court *for scandal*, and any person or party having filed such exceptions for impertinence (*d*), *does not set the same down* for hearing *within six days* after the filing thereof, such exceptions are to be considered as *abandoned*, and the person or party by whom such exceptions were filed is to pay to the

(*d*) Exceptions for impertinence are now abolished (15 & 16 Vict. c. 86, s. 17); but the court may direct the costs of impertinent matter contained in any proceeding to be paid by the party introducing it, on application to the court for that purpose, but such costs shall be applied for only at the time when the court disposes of the costs of the cause or matter. (15 & 16 Vict. c. 86, s. 17, and 30th G. O., 7th August, 1852, (A).)

opposite party such *costs* as may have been incurred by such party in respect of such exceptions. (24th ibid.)

Upon the production of an order, made upon its being held that any pleading or other matter depending before the court is scandalous or impertinent (*e*), the officer having the custody or charge of such pleading or other matter is to expunge from such pleading or other matter such parts thereof as the court has held to be scandalous or impertinent, and thereupon the person or party requiring such scandalous or impertinent matter to be expunged, is to pay to the officer expunging the same the same fee as on the like occasion has heretofore been paid. (25th ibid.)

Counsel's brief on exceptions consists of a printed copy of the bill, brief copies of the interrogatories relating to the particular defendant whose answer is excepted to, and of the answer and exceptions, and may be accompanied by any *useful* observations that occur to the solicitor.

The judge is also to be furnished with similar papers, excepting, of course, the observations.

The hearing will then proceed like the hearing of a cause.

Although the practice of excepting to bills, answers, and other proceedings in the court for impertinence, is abolished, the act abolishing it provides that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the said court to be paid by the party introducing the same, upon application being made to the court for that purpose (15 & 16 Vict. c. 86, s. 17); and by the 30th G. O., 7th August, 1852 (A.), such application is to be made at the time when the court disposes of the cause or matter, and not at any other time. It must clearly appear that the allegations excepted to are not in any way material to the party's case, and a short statement, showing the relator's interest and connection with the subject-matter of the information, is not impertinent. (*Richards* v. *Attorney-General*, 12 Cl. & Fin. 30; 9 Jur. 383.) The 16th G. O.

(*e*) See ante, note (*d*), p. 39.

of August, 1841, declares that where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

It seems that for scandal exceptions may be filed at any time (*Fenhoulet* v. *Passavant*, 2 Ves. 23; *Anon.*, ibid. 630); and though the party excepting be in contempt. (*Cattell* v. *Simons*, 5 Beav. 396; *Everett* v. *Prythergeh*, 12 Sim. 363.)

The 28th G. O. of 3rd April, 1828, provides that where a plaintiff obtains a decree with *costs*, the costs occasioned to the plaintiff by the insufficiency of the answer of any defendant are to be deemed to be part of the plaintiff's costs in the cause, such sum or sums being deducted therefrom as were paid by the defendant, according to the course of the court, upon the exceptions to the said answer being submitted to or allowed. This order, however, was made during the operation of the old practice of paying certain fixed costs, varying according to the fact whether the defendant submitted to answer the exceptions before or after an order was obtained referring the exceptions to the master in ordinary, or before or after the master's report, or whether the insufficient answer was a first or second answer. Thus, the costs were 20*s.* upon submission before order, and 30*s.* after order and before report, without reference to whether the cause was what was termed a town cause or a country cause. Again, they were 40*s.* in a town, and 50*s.* in a country cause, upon a first answer being reported insufficient—50*s.* and 60*s.* for a second—and taxed costs for a third. On the other hand, when the answer was reported sufficient, the plaintiff was to pay costs, according to the same scale, to the defendant. The Orders of 2nd November, 1850, which now chiefly regulate the practice of exceptions for scandal and insufficiency, do not state what costs (if any) shall be payable, either upon a defendant's submitting to answer exceptions, or upon a first or second answer being held insuffi-

cient, the only provisions in that behalf being those contained in the 22nd and 24th of those orders, which require a defendant to pay such costs as the court shall think fit to award upon a *third* answer being held insufficient, and also giving such costs as may have been incurred by the opposite party, where the party filing exceptions for scandal does not set them down within six days. Upon the hearing of exceptions for insufficiency, the costs of those allowed were set off against those disallowed. (*Willis* v. *Childe*, 13 Beav. 454.) When such exceptions are overruled, the practice is to overrule them with costs. (*Stent* v. *Wickens*, 5 De G. & S. 384.)

TRAVERSING NOTE.

The practice of filing a traversing note was created by the 21st, 22nd and 23rd of the General Orders of the 26th of August, 1841, which were subsequently discharged by the 1st of the General Orders of the 8th of May, 1845, which latter orders renew the practice with some alterations and additions.

These orders provide as follows:—

After the expiration of the time allowed to a defendant to plead, answer or demur (not demurring alone) to any original or supplemental bill or bill amended before answer, if such defendant has filed no plea, answer or demurrer, the plaintiff may file a note at the record and writ clerks' office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill." (52nd G. O., May 8th, 1845.)

After the expiration of the time allowed to plead, answer or demur (not demurring alone) to a bill amended after answer, the plaintiff (if a defendant has not filed any plea, answer or demurrer) may file a note at the record and writ clerks' office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed an

answer traversing the allegations introduced into the bill by amendment." (53rd ibid.)

After the expiration of the time allowed to a defendant to put in his further answer to any bill, the plaintiff (if such defendant shall not have put in any further answer) may file a note at the record and writ clerks' office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed a further answer traversing the allegations in the bill whereon the exceptions are founded." (54th ibid.)

Where a demurrer or plea to the whole bill is overruled, the plaintiff, if he does not require an answer, may immediately file his note in manner directed by Orders LII. or LIII., as the case may require, and with the same effect, unless the court, upon overruling such demurrer or plea, gives time to the defendant to plead, answer or demur: and in such case, if the defendant files no plea, answer or demurrer within the time so allowed by the court, the plaintiff, if he does not then require an answer, may on the expiration of such time file such note. (55th ibid.)

A traversing note having been filed, a copy thereof is to be served on the defendant against whom the same is filed, in the manner directed by the 19th and 21st of the Orders of the 26th of October, 1842, for the service of documents not requiring personal service. (56th ibid.)

A traversing note being filed, and a copy thereof duly served, is to have the same effect as if a defendant had filed a full answer or further answer traversing the whole bill, or such parts of the bill as the note relates to, on the day on which the note was filed. (57th ibid.)

After the service of the copy of a traversing note filed as aforesaid, a defendant is not at liberty to plead, answer or demur to a bill, or to put in any further answer thereto, without the special leave of the court, and the cause is to stand in the same situation as if such defendant had filed a

full answer or further answer to the bill on the day on which the note was filed. (58th ibid.)

An order was made, after a traversing note and replication were filed, on defendant's application to enable him to file an answer, that the note should be taken off the file. (*Towne* v. *Bonnin*, 16 L. J. 182; 11 Jur. 261.)

A plaintiff having filed a traversing note, desired to hear the cause on motion for decree, but the record and writ clerk refused his certificate to enable him to do so; upon application to the Court of Appeal, it was held, that upon the proper construction to be put upon the 57th General Order of May, 1845, and the 15 & 16 Vict. c. 86, s. 15, the required certificate ought to have been given. (*Maniere* v. *Leicester*, 22 L. T. 341; 23 L. J. 263.)

The 13th, 14th, 15th and 16th Articles of the 16th of the same Orders also refer to the subject, but they do not add anything to the orders above set forth, except perhaps to show (see Art. 16) that they apply to all cases where an appearance has been entered, whether by or for the defendant.

By the 26th section of the 15 & 16 Vict. c. 86, it is enacted, that where a defendant shall not have been required to answer and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill. From this, therefore, it would appear that in such a case a traversing note would be unnecessary, but a replication is still necessary. (28th G. O., 7th Aug. 1852, (A).) But this does not apply where a decree or decretal order is about to be moved for, though it does where the motion is made and fails. (*Duffield* v. *Sturgis*, 21 L. T. 205.) Nor does it apply where the defendant has been required to answer and has not answered, though the time for answering has expired: a traversing note is necessary. (*Heath* v. *Lewis*, 17 Jur. 1090.)

The orders relating to the practice of filing traversing notes do not apply to infant defendants. (*Emery* v. *Newson*, 10

Sim. 564.) And an ex parte application by the plaintiff to take his traversing note off the file will be refused. (*Simmons* v. *Wood*, 5 Beav. 390.)

The traversing note is engrossed on parchment without stamp, and is filed by the record and writ clerk, and a copy on paper is to be served on the defendant's solicitor the same day. Personal service is not required.

Where the plaintiff had served defendants with a subpœna out of the jurisdiction, and entered an appearance for them by default, an order for service of a copy of a traversing note on the defendants out of the jurisdiction was refused (*Anon.* 11 Jur. 28; *Anderson* v. *Stather*, 16 L. J. 152; 11 Jur. 96); but where a defendant who had not appeared was within the jurisdiction, personal service on him was ordered. (*Moss* v. *Buckley*, 2 Phil. 628; 17 L. J. 414; 12 Jur. 487; *Laurie* v. *Burn*, 6 Hare, 308; 17 L. J. 384; 12 Jur. 598.) In cases of bills of revivor or supplement, substituted service upon the defendant's solicitor has been ordered when the defendant could not be found, or was out of the jurisdiction. (*Wallis* v. *Darby*, 6 Hare, 618; 18 L. J. 216; *Scott* v. *Wheeler*, 13 Beav. 239; 20 L. J. 331.)

If the defendant does not appear at the hearing of the cause after a traversing note has been filed as to him, the plaintiff must open his case, and take such a decree only as the court may think him entitled to on the merits, and must be provided with an office copy affidavit of service of the note (*Evans* v. *Williams*, 6 Beav. 118), as well as of the subpœna to hear judgment.

INJUNCTION.

The practice relating to injunctions generally, except as to the evidence to be used in support of and against the applications for them, remains unaltered, but with regard to injunctions to stay proceedings at law, an important change is effected. It is enacted that the practice with respect to

these injunctions shall, so far as the nature of the case will admit, be assimilated to the practice respecting special injunctions generally; and such injunctions may be granted upon interlocutory applications supported by affidavit, as other special injunctions. (15 & 16 Vict. c. 86, s. 58.) No injunction to stay proceedings at law is to be granted as of course for default of appearance or answer to the bill. (45th G. O., 7th August, 1852, (A).) It would seem that a plaintiff, before moving to stay proceedings at law, must file interrogatories to his bill. (See *Lovell* v. *Galloway*, Weekly Rep. 118.) But a defendant is not by the 58th section discharged from the obligation of giving full discovery in aid of the defence at law; and in default of his answering the interrogatories, the court will, if necessary, restrain the action, upon application supported by affidavit. (*Senior* v. *Pritchard*, 20 L. T. 243.)

The effect of this change, abolishing as it does the peculiar practice of obtaining, first, the common injunction, and that by default of appearance or answer within eight days, a time almost always insufficient for the preparation and filing of an answer, and afterwards the order extending that injunction to stay trial as well as execution, has been to give rise to a uniformity of proceeding in applications for injunctions of what nature soever, which is found extremely convenient, and to abolish the exceptional character of injunctions to stay proceedings at law by doing away with the peculiarities which had attached themselves to those proceedings, for the existence of which no better reason could be suggested than might always be advanced in favour of other injunctions of an urgent nature not subject to the same practice.

It may be here observed with regard to injunctions generally, that by the 15 & 16 Vict. c. 86, s. 62, it is provided, that in cases where, according to the practice existing before the operation of the act, the court declined to grant equitable relief until the legal title or right of the party or

parties seeking such relief should have been established at law, the court may itself determine such title or right, without requiring the parties to proceed at law to establish the same.

An ex parte injunction is moved for immediately on filing the bill and affidavits; but if notice to the defendant is considered necessary, leave of the court may be obtained ex parte to serve the copy bill and notice of motion for an injunction at the same time and for a particular day; and this leave has been given in the case of a bill to stay waste before the bill was filed. (*Fosbrook* v. *Woodcock*, 12 Jur. 956; see also *Parker* v. *Great Northern Railway Company*, 4 De Gex & S. 138.) An ex parte injunction cannot be moved for after the defendant has appeared. (*Langham* v. *Great Northern Railway Company*, 1 De Gex & S. 486.)

By the 8th Rule of the General Orders of 25th October, 1852, it is required that, in cases of ex parte injunctions, the party making the application is to deliver copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of a written request and undertaking, or within such time as may be specified in such request or may have been directed by the court.

The writ of injunction bears a 20*s.* chancery stamp, and is prepared by the solicitor, and sealed by the record and writ clerk upon receiving a docket, the form of which may be had at a law stationer's, and upon production of the order. It should then be served personally on the parties restrained, the original writ being produced.

An injunction must be prayed for by the bill (*Wood* v. *Beadell*, 3 Sim. 273), and cannot be obtained in a suit by claim. (*Holden* v. *Chalcroft*, 14 Jur. 846.)

On an application for an injunction, lapse of time is always taken into consideration, and ex parte injunctions are less favourably regarded than injunctions asked upon notice previously given to the defendant, except where the urgency of

the case requires immediate application. The court of appeal declined to grant ex parte an injunction to restrain defendants who had been successful in an action at law against them from levying execution for the costs, except upon the terms of the plaintiff bringing the amount of the costs into court. (*Fisher* v. *Baldwin*, 1 Eq. Rep. 367; 22 L. J. 966.)

The same court refused an injunction ex parte to stay waste, but granted an interim order, with leave to discharge it, the object of the application being to preserve property pending litigation. (*Anwyl* v. *Owens*, 22 L. J. 995.) But generally the principle of the court is to grant the injunction upon an interlocutory application, if a primâ facie case be made out, and if more mischief would be done by withholding than by granting it. (*Coles* v. *Sims*, 22 L. T. 277.)

An executor not denying assets, nor disputing the debt, cannot, after the common decree in a creditor's suit, obtain an injunction to restrain an action by a creditor commenced against him before the suit, but not proceeded with since notice of the decree, except upon the terms of paying the costs at law and also the costs of the motion for the injunction. (*Cole* v. *Burgess*, 1 Kay, App. i.)

This court will grant an injunction in an administration suit to restrain a Scotch corporation, having large real estates in England, from continuing proceedings in the Court of Session in Scotland to obtain payment of a debt due from the testator, though by their articles of partnership they were entitled to a preferable lien upon the testator's shares; and service of the notice of motion at the office in London is good service, where it is admitted that the corporation had notice at the head office in Scotland. (*M'Laren* v. *Stainton*, 22 L. J. 274.)

It may be useful to bear in mind that now the same relief, by injunction, inspection and account, may be obtained in patent causes in the common law courts, by virtue of the 15

& 16 Vict. c. 83, s. 42, as before that act could only be obtained in equity; and also that the powers of the common law courts have since that act been greatly increased, viz. by the 17 & 18 Vict. c. 125, ss. 79 to 86, whereby such courts are enabled to grant injunctions in all cases of breach of contract or other injury where an action is maintainable and has been brought. Under this act (The Common Law Procedure Act, 1854) the plaintiff may also in the same action include a claim for damages or other redress.

When an injunction, but particularly an ex parte injunction, has been ordered, immediate notice should be given thereof to the parties sought to be affected by it, and that the injunction will be drawn up and served as quickly as possible. This done, any further proceedings by such parties in contravention of the terms of the injunction will be a contempt of court, if the plaintiff serves the injunction without delay. (See *Van Sandau* v. *Rose*, 2 J. & W. 264.)

Persons in court during the motion for an injunction, but absent when the order was made, may be committed for breach thereof, without any further notice of the injunction. (*Hearn* v. *Tennant*, 14 Ves. 136.)

By the 15 & 16 Vict. c. 76, s. 211, it is enacted, that in case a lessee, defendant in ejectment, his assignee or other person claiming any right, title or interest, in law or equity, of, in or to any lease, shall, within six months after execution executed, proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court and lodge with the proper officer such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to

be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and bonâ fide, without fraud, deceit or wilful neglect, make of the demised premises from the time of his intering into the actual possession thereof; and if what shall be so made by the lessor or landlord, happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord, what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

Affidavits may be received and read in opposition to a defendant's answer upon a motion or a petition in any suit for an injunction or a receiver, or to dissolve an injunction, or discharge an order appointing a receiver; and on such applications the answer shall be regarded merely as an affidavit of the defendant. (15 & 16 Vict. c. 86, s. 59.)

For the purposes of a motion for an injunction, as well as for any other proceeding before the court, any party may, by subpœna ad test. or duces tecum, require the attendance of any witness before an examiner of the court, or an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence on the motion or other proceeding; and any party having made an affidavit to be used, or which shall be used on any such motion or other proceeding before the court, must, on being served with such writ, attend before an examiner to be cross-examined; but the court has a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders or otherwise as may appear necessary to meet the justice of the case. (15 & 16 Vict. c. 86, s. 40.)

By the operation of this section, any claim or interlocutory proceeding before the court, or any proceeding in a matter not the subject of a suit, may be supported or opposed by oral testimony, obtained from adverse witnesses, an improvement in the practice of this court which it is impossible too highly to estimate. Before this alteration, claims in particular were known to fail altogether for want of evidence to support them, simply because such evidence was not to be compulsorily obtained, and in other cases that form of suit was not resorted to by reason of the impracticability of proving cases which, however good in themselves, there was no power in a plaintiff to compel an unwilling person to give evidence in support of. The same evil existed with regard to motions and petitions, many of which were either dismissed or not brought forward for the same reason. The effect of the difficulty felt in the case of a claim was, that it compelled the plaintiff, however unwilling, to have recourse to the long, tedious and expensive form of suit commenced by bill, for then only could he force a witness to give evidence.

By the operation of the 28th section, which abolishes the then existing practice as to the examination of witnesses, together with that part of the 40th section which enables a party to compel the attendance of a witness who has made an affidavit in order to be cross-examined, such a witness must be subjected to an oral cross-examination, unless the court, under the power conferred upon it by the 28th section, otherwise orders. In arriving, however, at this conclusion, it must be considered, that the examination of witnesses referred to in the 28th section means also cross-examination, which would seem to be the true and only reasonable construction.

On a motion for an injunction the plaintiff filed an affidavit, and before the motion was proceeded with, the court directed the witness to attend before the examiner for cross-examination before the defendant filed his affidavits,

that course being in accordance with the object of the statute. (*Besemeres* v. *Besemeres*, 22 L. T. 197.)

The mode in which a witness is to be examined, cross-examined and re-examined orally before an examiner, as well as other matters relating thereto, is shown under the title "*Evidence for the Hearing.*" According to the letter of the act, whatever may be the construction, there is this difference between witnesses who have made affidavits for the hearing of a cause, and witnesses who have made affidavits for the purposes of any other proceeding before the court, viz. that the former may be cross-examined and re-examined (15 & 16 Vict. c. 86, s. 38), whilst the latter can be cross-examined only (15 & 16 Vict. c. 86, s. 40), assuming of course that the proviso in the 38th section refers only to affidavits for the hearing; but a witness examined orally in the first instance, whether for the hearing of a cause or not, may be both cross-examined and re-examined. (15 & 16 Vict. c. 86, s. 31.)

The notice necessary to be given by one party to another, in any cause or matter, of requiring the attendance of a witness before an examiner, for the purpose of his being examined or cross-examined for the purposes of any claim, motion, petition or other proceeding before the court, not being the hearing of a cause, must be forty-eight hours at least, and must state the intention to examine such witness, and the time and place of such examination, unless the court dispense with such notice. (36th G. O., 7th August, 1852, (A).) The same time must also be given by a party intending to cross-examine a witness, whether a party or not to the cause or matter, who has made an affidavit for any of the above-mentioned purposes, not being for the hearing of the cause. (37th G. O., 7th August, 1852, (A).)

The following is a form of injunction:—

Form of Injunction.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith,

To C. D., [his servants, agents and workmen,] greeting:

Whereas, upon opening of the matter unto us in our Court of Chancery, before the Right Honourable the Vice-Chancellor [*or* Master of the Rolls] on the —— day of ——, 1854, by Mr. ——, of ——, counsel for the complainant in a cause wherein A. B. is complainant, and you, the said C. D. are defendant, It was alleged that on the —— day of —— instant, the complainant exhibited his bill in our said court against you the defendant, as by the certificate of the clerk of records and writs appeared, praying to be relieved touching the several matters therein complained of, and that you the defendant might be restrained by the injunction of our said court, from [*state the act to be prevented according to the order made*]: It was therefore prayed that an injunction might be accordingly awarded to restrain you the defendant in manner aforesaid: Whereupon and upon hearing [*as in the order*], it was ordered that an injunction should be awarded to restrain you the defendant C. D., [your servants, agents and workmen,] from [*state the act to be prevented according to the order*], until the further order of our said court: We, therefore, in consideration of the premises, do hereby strictly enjoin and restrain you the said C. D., [your servants, agents and workmen,] under the penalty of [double the estimated damages,] to be levied upon all and every your lands, goods and chattels to our use, from [*state the act to be prevented as above*] until the further order of our said court [*or as the case may be.*]

Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

ROMILLY, M. R.

The record and writ clerk will settle the draft, if any difficulty is felt as to the precise form.

Indorsement.

By the Lord High Chancellor of Great Britain.

Injunction.

A. B. *v.* C. D.

E. F., of ——, in the city of London, plaintiff's solicitor.

The writ of injunction must be impressed with a 20*s.* stamp, and duly served on all persons concerned without delay, but a preliminary notice may properly be served, stating that the injunction has been granted and the terms thereof, so as to fix the parties with as early a knowledge as possible. This notice is now frequently served in urgent cases by electric telegraph.

Injunctions are dissolved on motion, with notice to the

defendant, through his solicitor generally. This step may be taken as soon as the defendant is prepared by affidavits or otherwise to refute the case made by the plaintiff; but where the injunction is granted until answer and further order, the defendant's answer must first be put in.

The practice was, after answer filed (but not after exceptions to the answer are filed) (*Howes* v. *Howes*, 1 Beav. 197), to obtain as of course at the Rolls on petition, or by motion paper to the court or the judge having cognizance of the cause, *an order nisi to dissolve* an injunction staying proceedings at law; and such order being served at least two clear days before the day appointed, the defendant's counsel on the day named moved to make the order absolute, when the plaintiff's counsel, being previously instructed by a motion paper to undertake to show cause against dissolving the injunction, undertook accordingly, and the following motion day was appointed for that purpose. The answer, as already seen, is treated as an affidavit only on these occasions. There does not, however, appear any reason why this peculiar practice should be continued, and the intention of sect. 58 of the act 15 & 16 Vict. c. 86, would seem to be to abolish that practice, and treat all injunctions alike, whether in obtaining or dissolving them; and that for the latter purpose also, a notice of motion to dissolve should be given. And so, where the common injunction had been obtained before the act referred to, and the answer was afterwards filed, it was held that the proper practice was to give notice of motion to dissolve. (*Langford* v. *May*, 16 Beav. 32.) Upon a motion to dissolve, the plaintiff has no right to require it to stand over to enable him to cross-examine witnesses who have made affidavits for the defendant. (*Normanville* v. *Stanning*, 10 Hare, App., 20.)

The 60th General Order, May, 1845, provides that "the plaintiff in an injunction cause, having obtained the common injunction to stay proceedings at law, may (either before or

after the answer of a defendant is put in, and whether such injunction be or be not continued to the hearing of the cause) obtain one order, as of course, to amend his bill without prejudice to the injunction; and if such bill be amended pursuant to such order, such defendant may, thereupon, and although he may not have put in his answer to such bill or the amendments thereof, move the court, on notice, to dissolve the injunction, on the ground that such bill as amended does not, even if the amendments be true, entitle the plaintiff thereto."

Whether the words "common injunction" contained in this order will now be held to mean any injunction to stay proceedings at law, does not appear. Where an information was amended after a special injunction had been granted, by adding a plaintiff, the injunction was held to be thereby lost. (*Att.-Gen.* v. *Marsh*, 18 L. J. 272; 13 Jur. 317.)

The cause shown against dissolving an injunction is either exceptions to the answer, or merits disclosed therein, or in the affidavits filed on obtaining the injunction; which affidavits may be read against the answer. (*Custance* v. *Cunningham*, 13 Beav. 363.) If exceptions are shown as cause, the plaintiff must set them down for hearing at the latest on the day next after shewing such exceptions as cause. If he does not, the injunction is dissolved. (15th G. O., 2nd November, 1850.) The plaintiff showing cause upon the merits instructs his counsel accordingly, and the arguments proceed at the time appointed.

In case of a breach of an injunction the plaintiff may move to commit the offending party, either by giving a notice of motion (*Angerstein* v. *Hunt*, 6 Ves. 488), or by serving an order nisi obtained as of course. (*Durant* v. *Moore*, 2 R. & M. 33.) Personal service is necessary.

And by the 15 & 16 Vict. c. 76, s. 226, it is provided, that in case any action, suit or proceeding, in any court of law or equity, shall be commenced, sued or prosecuted, in dis-

obedience of any writ of injunction, in any other court than that in which such injunction may have been made, the other court, or any judge thereof, may stay all further proceedings contrary to such injunction.

There may be substituted service of the notice of motion to commit, on a proper case being made out. (*Pulteney* v. *Shelton*, 5 Ves. 147 a.)

The 39 & 40 Geo. 3, c. 36, enables a court of equity to order the Bank of England to suffer the transfer of stock or pay dividends, and to grant an injunction restraining such transfer or payment, although the Governor and Company are not parties to the suit.

The 4th section of the same act extends this provision to the East India Company and South Sea Company.

The 5 Vict. c. 5, s. 4 (1st Session), provides, "That on and after the said 15th day of October, 1841, it shall be lawful for the said Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way, without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the said Court of Chancery, upon such motion or petition as aforesaid, shall specify the amount of the stock or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: Provided always, that the said Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs, upon such application, as to the said court shall seem fit."

The order obtained under this section cannot be continued after time has been afforded for filing a bill, and no bill has been filed. (*Re Marquis of Hertford*, 1 Hare, 584; 8 Jur. 71.)

RECEIVER.

The application for the appointment in the first instance of a receiver is not varied by the recent alterations of practice. But this can only be said of the first appointment; for afterwards, when by death or otherwise the office of the person appointed has ceased, and it shall become necessary to appoint a person in his place, the application is to be made at chambers by summons supported by the usual affidavits. (*Grote* v. *Bing*, 9 Hare, App. 50; 20 L. T. 124; Weekly Rep. 80.) So, also, when the application is consented to it may be made at chambers. When the application is made in open court, it is by motion with notice, and the evidence to be used will be affidavits and the defendants' answer, if any, besides which when necessary evidence may be obtained from adverse witnesses under the provisions of the act 15 & 16 Vict. c. 86, which have been more particularly noticed under the head of "INJUNCTION," where also it is observed that affidavits may, by virtue of the 59th section, be read and received in opposition to a defendant's answer upon a motion or a petition in any suit for an injunction or a receiver, or to dissolve an injunction or discharge a receiver, the answer on such occasions being regarded merely as an affidavit of the defendant.

The order, in the first instance, if the application be made in court, and the appointment is to take place in chambers, will be in the following form:—

Form of Order directing a Receiver to be appointed.

Master of the Rolls, / *or* / Vice-Chancellor —— } —— day the —— day of ——, in the —— year of the reign of her Majesty Queen Victoria, 185—.

Between

Upon

This court doth order that a proper person be appointed to re-

ceive [*or*, that upon —— of —— first giving security, he be appointed receiver of] the rents and profits of the real estates, and to collect and get in the outstanding personal estate of ——, the testator in this cause named. And the tenants of the said real estates are to attorn and pay their rents in arrear and growing rents to such receiver. And it is ordered that ——, the executors of the said testator, deliver over to such person so to be appointed [*or*, to the said ——], all securities in their hands for such outstanding personal estate, together with all books and papers relating thereto. And it is ordered, that the person so to be appointed receiver [*or*, the said ——], from time to time pass his accounts and pay the balances which shall be certified to be due from him into the Bank, with the privity of the accountant general of this court, to be there placed to the credit of this cause. [*Add usual clause for investment.*]

By arrangement between the parties, when they can agree upon a person named, a receiver is frequently appointed in the first instance in open court. In the recent case of *Blackborough* v. *Ravenhill*, 16 Jur. 1085, the Vice-Chancellor Stuart, on a motion for a reference to appoint a receiver, said he would make the order appointing the person proposed by consent without a reference on the production of the usual affidavits of fitness.

Except by consent, when it is frequently done, generally a solicitor or party in the cause is not eligible to the office of receiver, although a practising barrister is. (*Garland* v. *Garland*, 2 Ves. 137.) But where the plaintiff is the person beyond doubt chiefly interested in the property, this rule would hardly apply. Therefore, where the plaintiff was formerly in partnership with the defendant, had advanced all his capital, and was liable to the partnership debts, he, offering to act without salary, was appointed receiver of the partnership assets. (*Hoffman* v. *Duncan*, 18 Jur. 69.) A peer is not eligible (*Att.-Gen.* v. *Gee*, 2 V. & B. 208); nor is a master in chancery (*Ex parte Fletcher*, 6 Ves. 426); nor a receiver-general of a county. (*Att.-Gen.* v. *Day*, 2 Madd. 246.)

The time when a receiver is appointed depends upon the nature of the case. Generally, it is after answer, but it may be before; or even before appearance, if the circum-

stances warrant the application. (*Meaden* v. *Sealey*, 6 Hare, 620; 18 L. J. 168; 13 Jur. 297.) In an infant's suit, a receiver will be granted though not prayed for by the bill, if the court thinks it necessary. (*Simpson* v. *Gutteridge*, 1 Turn. C. P. 448.) A bill is not, however, always necessary, as a receiver may be granted in a suit by claim (*Chalk* v. *Sanders*, 14 Jur. 847); though not prayed for by the claim. (*Bickford* v. *Chalher*, 14 Jur. 997.) It may be granted at the hearing (*Osborne* v. *Harvey*, 1 Y. & C. 116); or even after decree (*Bowman* v. *Bell*, 14 Sim. 392; 14 L. J. 119); but see *Barlow* v. *Gains* (8 Beav. 329); *Fallows* v. *Lord Dillon* (Weekly Rep. 101).

The cases are very numerous in which a receiver may be appointed. A judgment creditor who has issued an elegit is entitled to file a bill and have a receiver appointed. (*Rhodes* v. *Lord Mostyn*, 1 Eq. Rep. 212.) But where an elegit was not issued and the judgment was not entered up for a year previous to the motion, it was refused. (*Smith* v. *Hurst*, 1 Coll. 705; 9 Jur. 343.) When there is no fraud and the plaintiff's title is doubtful, it will be refused. (*Lancashire* v. *Lancashire*, 9 Beav. 120; 15 L. J. 54; 9 Jur. 956.) But the court will appoint a receiver notwithstanding grave doubts as to the propriety of the frame of the suit and the necessity for additional parties. (*Fripp* v. *The Chard Railway Company*, 17 Jur. 887; 22 L. J. 1084.) A receiver will be refused if the application be by a mortgagee having the legal estate. (*Sturch* v. *Young*, 12 L. J. 56; 5 Beav. 557.) But a receiver may be appointed against a mortgagee in possession at the suit of a second mortgagee, the first being alleged to have been paid off. (*Hiles* v. *Moore*, 15 Beav. 175.) Exclusion is a sufficient ground for the appointment of a receiver in partnership cases; but partners may by contract provide for exclusion in certain events. (*Blakeney* v. *Dufaur*, 15 Beav. 40.) There may be a receiver of a government pension, the trustees being out of the jurisdiction. (*Noad* v. *Backhouse*, 2 Y. & C. 529.) Also, of real estates in Italy. (*Hinton* v.

Galli, 2 Eq. Rep. 479.) And so in almost every case where the plaintiff may be damnified by allowing the property to remain in the defendant's hands, provided the plaintiff's title is clear, and he cannot otherwise help himself.

By the 84th General Order, 8th May, 1845, it is declared, that in pronouncing the decree the court may, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the bill has been ordered to be taken pro confesso to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real or personal estate of such sum or sums of money as at the hearing or any subsequent stage of the cause the plaintiff appears to be entitled to: provided that unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the court afterwards thinks fit to order restitution to be made.

A receiver appointed in a foreclosure suit is functus officii on the dismissal of the bill, and any money in his hands belongs to the mortgagee. (*Paynter* v. *Carew*, 23 L. T. 21. See also *Davis* v. *Duke of Marlborough*, 2 Swanst. 168.)

This subject is further noticed in Part II., infra.

NE EXEAT REGNO.

This writ issues upon a bill filed in order to prevent a debtor leaving the kingdom without satisfying or making provision for the debt. The plaintiff's demand must be a clear money demand (*Blaydes* v. *Calvert*, 2 J. & W. 211); and, as a general rule, it must be actually due. (*Whitehouse* v. *Partridge*, 3 Swanst. 365.) It must be an equitable debt or demand (*Ainswick* v. *Barklay*, 8 Ves. 594), unless it be under an order for alimony, when it may issue for the arrears due and the costs (*Dawson* v. *Dawson*, 7 Ves. 173; *Anon.*,

2 Atk. 210), or unless it be for a sum due upon the balance of an account. (*Jones* v. *Sampson*, 8 Ves. 593.)

There must not be any delay in applying for the writ (*Jackson* v. *Petrie*, 10 Ves. 164); and it may be applied for ex parte, although the defendant has appeared (*Elliott* v. *Sinclair*, Jac. 545), immediately after the filing of the bill, upon affidavit verifying the allegations in the bill. The bill must be filed before the affidavit is sworn. (*Anon.*, 6 Madd. 276.) The writ may be granted although not prayed for by the bill (*Moore* v. *Hudson*, 6 Madd. 218; *Collinson* v. ——, 18 Ves. 353; *Barned* v. *Laing*, 13 Sim. 255; 12 L. J. 377; 7 Jur. 383; *Whitehead* v. *Bennett*, 10 Jur. 3); but if there is a sufficient ground for the writ at the time of filing the bill, it should be prayed for. (*Sharp* v. *Taylor*, 11 Sim. 50.)

The affidavit must state an intention to leave the kingdom or circumstances indicating such intention, and the grounds of belief had better be stated. (*Russell* v. *Asby*, 5 Ves. 96.) It must show a certain sum due (*Roddam* v. *Hetherington*, 5 Ves. 91; *Jackson* v. *Petrie*, 10 Ves. 164), and must be as positive as in the case of legal bail (*Flack* v. *Holme*, 1 J. & W. 408; *Hyde* v. *Whitfield*, 19 Ves. 342), unless the amount depends on an account. (*Jackson* v. *Petrie*, supra.) If the debt appears upon a report or by admissions in the defendant's answer, an affidavit is not required. (*Roddam* v. *Hetherington*, supra.)

The order is drawn up, passed and entered, and the writ is prepared by the solicitor on a 20*s.* chancery stamp, and sealed by the record and writ clerk upon having handed to him a præcipe and the order. The writ is in the following form:—

Form of Ne Exeat Regno.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of ——, greeting: Whereas it is represented unto us in our Court of Chancery, on the part of ——, complainant against —— defendant, amongst other things that he the said defendant is greatly indebted to the said complainant, and

designs quickly to go into parts beyond the seas, as by oath made in that behalf appears, which tends to the great prejudice and damage of the said complainant; therefore, in order to prevent this injustice, we do hereby command you, that you do without delay cause the said —— personally to come before you, and give sufficient bail or security in the sum of —— that he the said —— will not go or attempt to go into parts beyond the seas, without leave of our said court; and in case the said —— shall refuse to give such bail or security, then you are to commit him the said —— to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to our said Court of Chancery, distinctly and plainly under your seal, together with this writ.

Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

ROMILLY, M. R.

Indorsement.

By the Lord High Chancellor of Great Britain.

At the instance of the within-named A. B.

Take security in the sum of ——.

[*Name and address of plaintiff's solicitor and agent, if any.*]

An application for leave to amend without prejudice to a writ of ne exeat regno was refused (*Grant* v. *Grant*, 2 Sim. 14); although the writ is not discharged by obtaining an order of course to amend if the plaintiff's case is not substantially varied. (*Ibid.*, 5 Russ. 189.) The writ may be discharged for irregularity upon motion supported by affidavit before the defendant puts in his answer.

PRODUCTION AND INSPECTION OF DOCUMENTS.

The application for production by the defendant of documents in his possession or power, usually made by the plaintiff on the coming in of the defendant's answer, may also be made before or without answer. The court may, on the application of the plaintiff in any suit, whether by bill or claim, and with or without answer or interrogation as to possession of documents, order production by any defendant on oath of documents in his possession or power relating to the mat-

ters in question, and may deal therewith when produced as shall appear just. (15 & 16 Vict. c. 86, s. 18.)

There is also in this act a corresponding advantage given to the defendant, although as a general rule it does not enable him to see his adversary's documents, until he has put in a full and sufficient answer. It does not therefore enable him to frame his defence accordingly upon information otherwise out of his reach, and in this respect therefore it does not appear that the practice is materially altered, seeing that before the act, under special circumstances, a defendant might obtain access to documents in the plaintiff's possession or power, even before answer. A defendant might also, before the act, obtain production of documents not privileged in the plaintiff's possession or power after answer. Nevertheless it must be admitted that, both in the modes of making the application and of supporting it, a very important improvement is effected in favour of the applicant, for production. The application for production of documents, whether by the plaintiff or by the defendant, must be made by summons at chambers in the first instance, and the party required to produce will then be ordered as of course to furnish on oath a list of all documents in his possession or power relating to the matters in question. This is done by his making an affidavit, of which the following is the form, as settled by the majority of the judges :—

Form of Affidavit as to Production of Documents, under Sections 18 *and* 20 *of the Act of* 15 *&* 16 *Vict. c.* 86.

In Chancery.

Between, &c.

I ——, of ——, make oath and say as follows :—

1. I say I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule (*a*) hereto annexed.

(*a*) The schedule to be divided into two parts, when the deponent objects to the production of any of the documents.

The first part is to contain the documents in the deponent's possession, to the production of which he does not object.

The second part is to contain the documents in the deponent's possession, if any, to the production of which he does object.

2. I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. I further say, [*state upon what grounds the objection is made, and verify the facts so far as may be*].

4. I further say, that I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto annexed.

5. I further say, that the last-mentioned documents were last in my possession or power on [*state when*].

6. I further say, [*state what has become of the last-mentioned documents, and in whose possession they now are*].

7. I further say, according to the best of my knowledge, remembrance, information and belief, that I have not now, and never have had, in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, or solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

NOTE.—If the party denies having any, he is to make an affidavit in form of the seventh paragraph, omitting the exception.

Besides the above mode of eliciting the information, if the plaintiff is not too late, he may file interrogatories for the examination of the defendant as to documents in his possession or power, and that although the bill does not contain any charge that he has any. (*Perry* v. *Turpin*, 23 L. T. 87.)

As to whether a company or corporation answering under their common seal is a defendant against whom an order may be made under the 18th section, see *Law* v. *The London Indisputable Life Policy Company*. (10 Hare, App., 31.)

If there should be a difficulty as to the right to production or otherwise, the judge will, on the hearing of the summons, adjourn the matter into court for argument. Of course, when the necessary facts appear upon the defendant's answer, the affidavit may be dispensed with. It seems that a motion for production at or before the hearing must

be founded on the answer or affidavit of the party required to produce; and that the 18th section does not enable the court to make an order founded upon the affidavit of any other person, and not upon the admission of the party required to produce. (*Lamb* v. *Orton*, 1 Drew. 414; 10 Hare, App., 31; 22 L. J. 713.) Upon a motion in court by a defendant for the production of documents by the plaintiff, Vice-Chancellor Stuart held that the documents required must be specified in the notice of motion, and that there must be evidence that the plaintiff has such documents in his possession. (*Fiott* v. *Mullins*, 16 Jur. 946; 20 L. T. 50.) But in a later case the same learned judge considered sufficient a general statement of the particulars required to be produced, together with an affidavit of the defendant's solicitor, that from information obtained during the conduct of the cause, he believed, and had no doubt the plaintiff had in the possession or power of himself, or of his solicitors or agents, divers originals and copies of letters, reports, &c., and other written communications relating to or containing some entry or passage relating to the several contracts or works in the pleadings mentioned and the matters in question in the suit, added to which there was the admission of the plaintiff in his own affidavit of the possession of some of the particulars described in the notice of motion. (*M'Intosh* v. *The Great Western Railway Company*, 16 Jur. 989; 20 L. T. 77.) On appeal, however, the Lords Justices ordered the plaintiff, against whom the motion was made, to make affidavit on or before a certain day of all documents, &c., in his possession or power. (22 L. J. 182.) These cases occurred earlier in the operation of the act. But now it may be considered that the applicant need not support by evidence his application for production (*The Rochdale Canal Company* v. *King*, 15 Beav. 11; 9 Hare, App. 49, n.); yet upon a summons by a plaintiff in a claim for production by defendants of documents, which in an affidavit the plaintiff's solicitor stated his belief to be in their pos-

session, the application was refused by the Vice-Chancellor Stuart, although an affidavit of the defendant's solicitor showed that they had some of the documents in their possession. (*Wing* v. *Harvey*, 10 Hare, App., 68; 17 Jur. 481; 20 L. T. 274.)

Under the usual order for inspection by the plaintiff, his solicitors or agents, a defendant may be refused inspection. (*Bartley* v. *Bartley*, 16 Jur. 1062; 20 L. T. 140; 22 L. J. 47; 1 Drewry, 233.) So also may a relation of the plaintiff, who is not the solicitor or professionally engaged in the cause. (*Summerfield* v. *Pritchard*, 10 Hare, App., 68; 22 L. J. 528; 21 L. T. 41; 17 Jur. 361.)

A motion to produce documents not in the absolute possession of the defendants, who were three only of a numerous body of directors of an insurance company, and treasurers of the office, was refused with costs, the Vice-Chancellor Kindersley stating that if documents were in the possession of A., B. and C., he could not order A. to produce them. (*Penny* v. *Cooke*, 20 L. T. 200.) Nor will production be ordered against one person of documents held by a solicitor for that person and others (*Cridland* v. *Lord de Manly*, 13 Jur. 442); nor against an agent of documents relating also to other persons' property, or held also for other persons. (*Lopez* v. *Deacon*, 6 Beav. 254; 12 L. J. 311; *Airey* v. *Hall*, 12 Jur. 1043; *Sweet* v. *Hunter*, 9 Jur. 807.) But see *Richardson* v. *Hastings*, 7 Beav. 354; 13 L. J. 416. Documents in the possession of defendant's solicitor will, however, be ordered to be produced, though the solicitor claims a lien upon them. (*Rodick* v. *Gandell*, 10 Beav. 270; but see *Palmer* v. *Wright*, 10 Beav. 234.) The documents must relate to the plaintiff's title to give him a right to production, and to prevent production there must be a denial that they do so relate. (*Smith* v. *Duke of Beaufort*, 1 Phil. 209; 7 Jur. 1095; *Edwards* v. *Jones*, 1 Phil. 501; 9 Jur. 145; *Harris* v. *Harris*, 4 Hare, 179; 9 Jur.

987 ; *Bannatyne* v. *Leader*, 10 Sim. 230 ; see also *Marquis of Bute* v. *Glamorganshire Canal Company*, 1 Phil. 681 ; 15 L. J. 60 ; 9 Jur. 1063 ; *Combe* v. *Corporation of London*, 1 You. & Coll. 631 ; 15 L. J. 80 ; 10 Jur. 57.)

Confidential communications between a party and his solicitor and counsel, either during the suit or before it, but with reference to it, are privileged. (*Robinson* v. *Flight*, 8 Beav. 22 ; 13 L. J. 425 ; 8 Jur. 888 ; see also *Claggett* v. *Phillips*, 2 Y. & Coll. 82 ; 7 Jur. 31 ; *Lord Walsingham* v. *Goodricke*, 3 Hare, 122 ; *Follett* v. *Jefferyes*, 13 Jur. 972 ; *Woods* v. *Woods*, 4 Hare, 83 ; 9 Jur. 102, 615 ; *Reece* v. *Tyre*, 9 Beav. 316 ; *Beadon* v. *King*, 13 Jur. 550.) But although the documents may be used against the defendant on a criminal proceeding, he will be ordered to produce them if the crime was committed after the commencement of the suit. (*Rice* v. *Gordon*, 13 L. J. 104 ; 7 Jur. 1076.) Where some of the documents admitted are privileged and others not, and the party to produce cannot seal up or separate them, he must produce the whole. (*Carew* v. *White*, 5 Beav. 172.) Land agents paid by commission will be directed to deliver up maps, plans, &c. relating to the estates made or collected in the course of their employment, though alleged to be made for their own private use. (*Lady Beresford* v. *Driver*, 22 L. J. 407.) But where a plaintiff's attorney in an action communicated to the plaintiffs in another action against the same defendant, and involving substantially the same question, a case and opinion taken on behalf of the plaintiffs in the former action, with permission to copy it, and the defendant filed a bill of discovery against the plaintiffs to whom the case and opinion were lent, the copy so made was held to be privileged. (*Enthoven* v. *Cobb*, 2 De G. M. & G. 632 ; 17 Jur. 81.)

Where two defendants admitted the possession of documents and one died, the survivor will not, in the absence of the representatives of the deceased defendant, be ordered to produce them. (*Robertson* v. *Shewell*, 15 Beav. 277.)

A plaintiff asserting that the defendant is a mortgagee who has been paid off, and requiring production of the deed, which he impeaches, and the defendant admitting its possession, but alleging that it was a bonâ fide conveyance to him for valuable consideration, the deed was ordered to be produced; all documents depending upon and proceeding from an impeached title deed may be required to be produced, and therefore in a suit to set aside a conveyance of an equity of redemption to defendant, a receipt for mortgage money obtained by him after the date of the deed must be produced. (*Jones* v. *Jones*, 1 Kay, App. vi.)

Under an order for production, denial upon oath of relevancy of concealed passages is not sufficient, and on the court ascertaining that they might possibly refer to the questions at issue, on a motion to commit the defendant, the defendant was ordered to produce the concealed passages and to pay the costs of the application. (*Caton* v. *Lewis*, 22 L. J. 946.)

When documents have been ordered to be produced at the solicitor's office, the court will not order inspection by witnesses before examination and production at any other place, notwithstanding an allegation that they are forged. (*Groves* v. *Groves*, 22 L. T. 184.)

Letters which, with other goods in a portmanteau, were pawned by defendant before suit, will not be ordered to be produced. (*Liddell* v. *Norton*, 1 Kay, App. ii.)

Counsel will not be heard at chambers to oppose a summons for production of documents, the course being to adjourn to the open court. (*Dipple* v. *Corles*, 22 L. J. 15.) This was also the course taken in *Penny* v. *Cooke* just cited. This practice, however, has been greatly trenched upon, and counsel are sometimes heard at chambers.

Before ordering the production of original records, the court requires it to be shown that the office copies will not be sufficient. (*Anon.*, 13 Beav. 420.)

When any deeds or other documents are ordered to be

left or deposited, the same are to be left or deposited in the Record and Writ Office, and are to be subject to such directions as may be given for the production thereof. (57th G. O., 16th Oct. 1852.) And the 8th General Order of October, 1842, provides, that any clerk of records and writs, being required to attend with any record or document at any assizes, or at any court or place out of the Court of Chancery or the offices thereof, shall be entitled to require that the solicitor, or party desiring such his attendance, shall deposit with him a sufficient sum of money to answer his just fees, charges and expenses in respect of such attendance, and to undertake to pay any further just fees, charges and expenses which may not be fully answered by such deposit.

After the object of a deposit of documents in the Record and Writ Clerks' Office is answered, an order for their delivery out is necessary, but not so when deposited in the Master's Office. (*Runnall* v. *Yarroll*, 21 L. T. 178.)

OBJECTION FOR WANT OF PARTIES.

According to the recent practice, when a defendant by his answer objected that a material party or parties had been omitted from the bill, the plaintiff ought to have set down the cause for hearing on that objection only within fourteen days from the filing of the answer. This was required by the 39th of the General Orders of the 26th of August, 1841, in order that the opinion of the court might be expressed at an early stage of the suit, and that thereby the plaintiff might know whether or not his suit was properly constituted in time to remedy the defect, if it were not so. If he omitted to set down the cause on this objection, and proceeded to a hearing, he could not rely upon being allowed to amend his bill if it turned out at the hearing to be defective. But now by the 43rd section of the act 15 & 16 Vict. c. 86, this practice is abolished.

This doubtless is owing to several other sections of this act, which are noticed elsewhere, affording great facilities

for rectifying an error in the constitution of a suit at the hearing, and for making decrees in the absence of persons who should have been parties, and at the same time directing amendments when necessary, or nominating persons not parties to act for the purposes of the suit as the legal personal representatives of deceased persons.

When the answer suggests that certain persons ought to be parties, and the plaintiff by amendment makes them parties, it is an admission by the plaintiff that they are necessary parties; and when the objection is raised by the answer, the practice of setting down the cause on such objection being abolished, the old rule is thereby restored, and the costs of the day will be given when the objection prevails at the hearing; but no such costs unless the objection is taken by the answer. (*Moodie* v. *Bannister*, 1 Eq. Rep. 180; 17 Jur. 520; 21 L. T. 148.)

The parties stated to be necessary being in Scotland, and not having been served, the court refused to proceed without them; although, if there had been a real difficulty as to service, it might be different. Leave was given to serve the parties, and an affidavit was directed to be filed pro formâ, stating places of residence. (Ibid.)

The 42nd section of the act 15 & 16 Vict. c. 86, provides that objections for want of parties cannot be taken in any of the following cases:—

Rule 1. Where a decree for the administration of the personal estate of a deceased person is sought for by a residuary legatee or next of kin, without serving the remaining residuary legatees or next of kin.

Rule 2. Where a decree for the administration of the estate of a deceased person is sought for by a legatee interested in a legacy charged upon real estate or by a person interested in the proceeds of real estate directed to be sold, without serving any other legatee or person interested in the proceeds of the estate.

Rule 3. Where a like decree is sought for by a residuary

devisee or heir, without serving any co-residuary devisee or co-heir.

Rule 4. Where a decree for the execution of the trusts of a deed or instrument is sought by any one of several cestuis que trust under the deed or instrument, without serving any other of such cestuis que trust.

Rule 5. Where one person sues on behalf of himself and all persons having the same interest in suits for the protection of property pending litigation, and in cases in the nature of waste.

Rule 6. Where a decree for the administration of an estate or for the execution of trusts is sought by an executor, administrator or trustee against any one legatee, next of kin or cestui que trust.

By the 7th rule it is provided, that in all the above-mentioned cases the court may, if it shall see fit, require any other person or persons to be made a party or parties, and may give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

PLAINTIFF'S ANSWER.

The entirely novel proceeding of a plaintiff putting in an answer in his own suit to interrogatories filed by a defendant without the aid of a cross bill, is a great boon to the suitor of this court, if it can clearly be ascertained what the practice on the subject is to be. The defendant having put in a sufficient answer to the plaintiff's interrogatories,—provided the plaintiff requires an answer from him, but if not, then it is presumed at any time after his appearance, and the expiration of the time allowed to the plaintiff to file interrogatories,—may, if he desires to do so, file interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects as to which a discovery is

sought, and deliver a copy of such interrogatories to the plaintiff or his solicitor, and in that case the plaintiff shall be bound to answer as if the same had been contained in a bill of discovery filed by defendant against plaintiff on the day when such interrogatories shall have been filed, and as if the plaintiff had on the same day duly appeared. (15 & 16 Vict. c. 86, s. 19.) The practice so far as relates to this subject is exceedingly doubtful. There are no general orders touching it, and the act itself does not limit the time within which the defendant is to file his interrogatories, nor does it specify within what time a copy is to be served on the plaintiff or his solicitor. Yet the plaintiff's time for answering (whatever that may be, but it is not stated) is made to run from the day on which the interrogatories are filed, for he is to answer as if he had duly appeared to a bill of discovery on the day on which the defendant's interrogatories are filed. Thus, then, supposing the defendant does not serve a copy of his interrogatories till the last day of the time allowed for the plaintiff to put in his answer, the plaintiff would be required to answer on that day. As to the actual time within which a plaintiff is to file his answer, having been served with a copy of defendant's interrogatories, it does not appear to be any more clearly defined. It has been just observed that the plaintiff is bound to answer as if he had appeared to a bill of discovery on the day of the filing of the interrogatories (15 & 16 Vict. c. 86, s. 19), and there does not seem to be anything else in the new acts or orders fixing the time for the plaintiff to answer. The 13th section refers only to pleas, answers and demurrers to be put in by a defendant; but it may be inferred that as, if the plaintiff had appeared to a bill of discovery, he must necessarily have been a defendant thereto, he will come within the last-mentioned section, and be allowed fourteen days from the delivery to him or his solicitor of a copy of the interrogatories. (19th General Order, 7th August, 1852, (A).) If the plaintiff should require further time to answer,

he must apply to the judge in the same way as a defendant would, for which see "*Plea, Answer, Disclaimer and Demurrer*," infra. The form of the plaintiff's answer is not adverted to in either of the acts, but the 21st of the General Orders having reference to answers generally, it is conceived that all answers should be in the form thereby provided, and which is similar to that described by the 14th section of the act 15 & 16 Vict. c. 86. (See form given infra, under "*Proceedings for Defendants to Bill.*")

If the defendant should except to the answer for insufficiency, and a further answer is to be put in, the General Orders of the 2nd of November, 1850, will, it is presumed, be brought into operation; and in that case, if the time for putting in a plaintiff's first answer be fourteen days, a disparity immediately appears between the time allowed for a first answer and that allowed for a further answer upon exceptions filed, as in the latter case, under the Orders just referred to, the time allowed without order is three weeks on a submission to exceptions before they are set down. Here, therefore, a plaintiff or defendant has three weeks to put in a further answer, whilst fourteen days only are allowed for putting in an original answer.

The words of the act requiring the plaintiff to answer, as if the interrogatories had been contained in a bill of discovery filed by the defendant against the plaintiff on the day when the interrogatories were filed, and as if the plaintiff had duly appeared on that day, convey but a vague notion of the time intended for answering, for it is not easy to discover what the appearance has to do with the matter at all according to the new practice. A defendant to a bill of discovery would, before the recent legislation, have been allowed six weeks after appearance to put in his answer. The act 15 & 16 Vict. c. 86, by section 13 fixes twelve days after appearance for a defendant to answer, whether he be required to do so or not; but under the power given to him by that section the Lord Chancellor, by the Orders of 7th August, 1852,

has altered the time for a defendant to answer who is required to do so, making it fourteen days after delivery of a copy of the interrogatories which he is to answer, so that in fact the appearance of the defendant has nothing to do with the question. If a bill of discovery were filed, the defendant to that bill must answer within fourteen days from delivery of interrogatories. But the act says nothing about delivery of interrogatories to the defendant in the case under consideration, and only requires him to answer as if he had appeared to the supposed bill on the day on which the interrogatories were filed. Now as, according to the present practice, the filing of interrogatories does not compel a defendant to answer, nor does the entering of an appearance, this enactment seems either not to come under any practice at all, and therefore not capable of being carried into effect, or, so far as concerns the time for answering, it must be considered as entirely overridden by the 19th of the General Orders of 7th August, 1852, (A), which gives a defendant fourteen days from the delivery of the interrogatories to put in his answer.

It will have been gathered from the foregoing remarks that no appearance is to be entered by the plaintiff prior to his filing an answer to the defendant's interrogatories.

[For further particulars as to the mode of taking an answer, and other matters connected with that proceeding, see "*Proceedings for Defendants to Bill.*"]

MOTION FOR DECREE OR DECRETAL ORDER.

After the time allowed to the defendant to answer has expired, but before replication, the plaintiff in any suit commenced by bill may move the court upon notice for such decree or decretal order as he may think himself entitled to, and affidavits may be filed in support of and in opposition to such motion, and may be used on the hearing thereof; and if after answer filed, the answer shall be treated as an affidavit. (15 & 16 Vict. c. 86, s. 15.) This application may therefore be made whether an answer is filed or not, pro-

vided it be not made after replication nor before twelve days after appearance entered by or for the defendant where no answer is required of him, nor before fourteen days after the delivery to the defendant or his solicitor of a copy of the plaintiff's interrogatories in cases where the defendant is required to answer, or such further time (if any) as the court or judge may have granted. But the court may grant or refuse such motion, or make such order as the circumstances of the case may require, and deal with the costs as it may think right. (15 & 16 Vict. c. 86, s. 16.)

The plaintiff may read a defendant's answer without notice, but a defendant cannot read the answer of his co-defendant without notice of such intention. (*Cousins* v. *Vasey*, 9 Hare, App., 61.) The 40th section of the act may be made available on this motion. (*Williams* v. *Williams*, 10 Hare, App., 45; 17 Jur. 434.)

One month's notice must be given by the plaintiff to the defendant or defendants of his intention to make this motion (22nd G. O., 7th August, 1852, (A)); and if the court grants further time to any defendant for pleading, answering or demurring, the plaintiff's right to move is in the meantime suspended. (15 & 16 Vict. c. 86, s. 13.)

Affidavits in support of this motion must be filed before the service of the notice of motion, and a list of them must be set forth at the foot of such notice. (23rd G. O., 7th August, 1852, (A).) Affidavits in opposition to the motion must be filed within fourteen days after service of the notice, and the defendant must furnish the plaintiff or his solicitor with a list thereof. (24th G. O., 7th August, 1852, (A).) Affidavits in reply must be filed within seven days after the expiration of such fourteen days, and must be confined to matters strictly in reply, and the plaintiff is to furnish the defendant or his solicitor with a list thereof. These latter affidavits are not to be regarded by the court, except so far as they are in reply, unless upon the hearing of the motion the court shall give leave to the defendant to answer them, in which case the costs thereof, and of the further affidavits

consequent thereon, shall be paid by the plaintiff, unless otherwise ordered. (25th G. O., 7th August, 1852, (A).) No further evidence on either side can be used on this motion without leave of the court. (26th G. O., 7th August, 1852, (A).)

The court has jurisdiction to issue a subpœna ad test. or duces tecum, requiring the attendance of witnesses on a motion for a decree. (*Wigan* v. *Rowland*, 10 Hare, App., 18.) And the plaintiff having made an affidavit in reply, the defendant was permitted to cross-examine him under the 40th section of the act. (*Williams* v. *Williams*, 10 Hare, App., 45; 17 Jur. 434.)

If the fourteen days within which, pursuant to the orders of the court, a defendant is bound to file his affidavits in answer to a motion for a decree, or the seven days within which the plaintiff is bound to file his affidavits in reply thereto, or the *nine* [now reduced to *eight* by General Order, 13th January, 1855] weeks after issue joined within which the evidence in any cause, to be used at the hearing thereof, is to be closed, or the month after the expiration of such *nine* [*eight*] weeks within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively is extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order; provided always, that in cases where the above-mentioned periods of fourteen days and *nine* [*eight*] weeks respectively shall be so extended, the seven days within which the plaintiff is bound to file his affidavits in reply, and the month during which a witness is subject to cross-examination, shall be respectively taken to commence from the expiration of such extended period. (1st G. O., 1st June, 1854.)

Every notice of such motion must be entered with the registrar, who is to make out a list of such motions, and the same are to be heard according to such list unless the court otherwise order. (27th G. O., 7th August, 1852, (A).)

A motion for a decree is set down by the registrar's clerk on production of the record and writ clerk's certificate of pleadings, which the party setting down must endorse as follows:—

"A. B., plaintiff's solicitor, 20th day of February, 1854.
[i. e. *the day of setting down.*]
Notice served 20th day of February, 1854.
„ expires 20th day of March, 1854."

The full Court of Appeal has decided that when a plaintiff gives a notice of motion for a decree, he should concurrently enter it with the registrar, and it is unnecessary to give any further notice to set it down; and if he omits to do so until after the expiration of the month, the court will not order it to be set down, except upon motion with notice. (*Boyd* v. *Jaggar*, 10 Hare, App., 54; 22 L. J. 895; 17 Jur. 655; 21 L. T. 234.)

The same relief will be granted upon a motion for a decree "according to the prayer of the bill," that could be obtained at the hearing of the cause in the ordinary way. (*Norton* v. *Steinkopf*, 1 Kay, 45.)

The filing of a traversing note does not prevent the cause being heard on motion for decree. (*Maniere* v. *Leicester*, 22 L. T. 341; 23 L. J. 263.)

Where trustees for an infant defendant, appearing by evidence to be of weak intellect, filed a bill to execute the trusts of the will, and moved, under the 16th section, for a reference to chambers to inquire into the state of the defendant's mind in order to save the expense of a commission of lunacy, the V. C. Kindersley, in exercising the discretion given him by that section, refused the motion. (*Adams* v. *Smyth*, 22 L. J. 968.)

It will be observed that the motion in question can only be made in suits commenced by bill. Although the General Orders have fixed the times for filing affidavits, in support of and in opposition to the motion, no time is fixed for the

examination, cross-examination, and re-examination of witnesses vivâ voce whose evidence is required for this proceeding. It may, therefore, be concluded, that, provided such witnesses are produced in sufficient time to enable the party to give the forty-eight hours' notice, and to enable his opponent to give the like notice of his intention to cross-examine, they will be regularly produced. The re-examination, if any, must, it is presumed, take place immediately after the cross-examination. (See also "*Joining Issue.*")

A motion for decree is in effect a cause, and must be set down as such. (*Drew* v. *Long*, 17 Jur. 173.) It may be set down as a short cause (ibid; *Ames* v. *Ames*, 10 Hare, App., 54; 17 Jur. 664; 22 L. J. 1005); but if set down as a short cause, and counsel on the other side says it is not fit for a short cause, that is conclusive, and it must keep its place on the list. (*Drew* v. *Long*, 17 Jur. 173.)

It may by consent be heard before the month has expired. (*Lomsworth* v. *Rowley*, 10 Hare, App., 55.) Leave may be obtained to serve defendants residing out of the jurisdiction with a notice of motion for a decree, an appearance having been entered for them by the plaintiff, but a copy of the order and of the affidavits in support of the motion will be directed to be served at the same time, and the order must specify the time for filing affidavits in answer. (*Meek* v. *Ward*, 10 Hare, App., 1.)

Form of Notice of Motion for Decree.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

Take notice that so soon after the expiration of one month as the state of the business and the practice of the court will permit, a motion will be made in this cause by counsel on behalf of the above-named plaintiff A. B. before His Honor the Master of the Rolls [*or*, the Vice-Chancellor ——] that [*state the substance of the prayer of the bill, or exactly what is intended to be asked for*] and

that the plaintiff may have such further or other relief as the nature of the case may require.

Dated this —— day of ——, 1854.

Yours, &c.,
E. F.,
Bedford Row, London,
plaintiff's solicitor.

To the defendant C. D.

List of Affidavits filed in support of the above Motion.

Affidavit of Plaintiff filed 12th May, 1854.
Affidavit of G. H. filed 13th May, 1854.

The affidavit of service is similar to that upon an ordinary motion, with the addition of a statement that a list of the affidavits in support of the motion was set forth at the foot of the notice.

The plaintiff may have the same relief upon a motion for decree, according to the prayer of the bill, as he could have at the hearing of the cause in the ordinary way. (*Norton* v. *Steinkopf*, 1 Kay, App., 10.)

MATTERS RELATING TO THE CONDUCT OF SUITS AND MATTERS GENERALLY.

MATTERS CONNECTED WITH THE MANAGEMENT OF PROPERTY.

It seems that any matter that may arise in the course of a suit relating to its conduct or the management of the property to which it relates, whether before or after decree, and requiring the interposition of the judge, may, under the 26th sect. of the act 15 and 16 Vict. c. 80, be adjudicated upon, either in court or in chambers, as the judge may think proper. That section provides, that the chamber business of the judges shall consist of such of the several matters there enumerated (amongst which are the two subjects above referred to) as they respectively shall from time to time think may be more conveniently disposed of in chambers than in open court. The proceeding at chambers will be by summons, supported by evidence of such facts as will satisfy the judge or the chief clerk, if it be a matter committed to him, of the necessity or propriety of the application.

AMENDED BILL.

The time for amending a bill, as regulated by the General Orders of the 8th of May, 1845, and the 13th of April, 1847, remains unaltered by the new acts and orders, except so far as the former may be inconsistent with the latter, or inapplicable to cases arising under the latter.

The 16th Order of May, 1845, Article 32, provides, that in cases where there is a sole defendant, or where, there being several defendants, they all join in the same answer, the plaintiff may, after answer, and before replication or undertaking to reply, obtain one order of course for leave to amend the bill, at any time within four weeks after the answer is deemed or found to be sufficient.

The 33rd Article provides, that, in cases where there are several defendants who do not join in the same answer, the plaintiff (if not precluded from amending, or limited as to the time of amending by some former order) may, after answer and before replication or undertaking to reply, at any time within four weeks after the last answer is deemed or found to be sufficient, obtain one order of course for leave to amend his bill.

The 34th Article provides, that, the plaintiff, having obtained an order for leave to amend his bill, has, in all cases in which such order is not made without prejudice to an injunction, fourteen days after the date of the order within which he may amend such bill.

If such bill be not amended within such fourteen days, the order for leave to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

The 35th Article provides, that, the plaintiff, having obtained an order for leave to amend his bill without prejudice to an injunction, must amend such bill within seven days from the date of the order.

If such bill be not amended within such seven days, the order for leave to amend becomes void, and the cause, as to

dismissal, stands in the same situation as if such order had not been made.

The 64th Order provides, that an order for leave to amend a bill may be obtained, at any time before answer, upon motion or petition, without notice.

The 65th Order provides, that an order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates or sums, may be obtained, at any time, upon motion or petition, without notice.

The 66th Order provides, that one order of course for leave to amend a bill, as the plaintiff may be advised, may be obtained by the plaintiff, at any time before filing (or undertaking to file) a replication, and within four weeks after the answer, or the last of several answers is to be deemed sufficient; but no further order of course for leave to amend a bill is to be granted after an answer has been filed, unless in the case provided for by Order LXV.

The 67th Order provides, that a special order for leave to amend a bill is not to be granted without affidavit, to the effect,—first, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and second, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff.

The 68th Order provides, that, after the plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time when the answer or last answer is deemed sufficient, a special order for leave to amend a bill is not to be granted, without further affidavit showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into such bill.

The 69th Order provides, that such affidavits as are mentioned in Orders 67 and 68 are to be made by the plaintiff and his solicitor, or by the solicitor alone in case the plaintiff from being abroad or otherwise is unable to join therein.

The 70th Order provides, that, where the plaintiff obtains an order for leave to amend his bill, and does not amend the same within the time limited for that purpose, the order to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

The General Order of the 13th April, 1847, provides, that the plaintiff is not to obtain an order of course for leave to amend his bill after a defendant (being entitled to move) has served a notice of motion to dismiss the bill for want of prosecution.

An information may be amended in the same manner and within the same time as a bill; but the sanction of the Attorney-General must first be obtained, as in the case of an original information, or it may be taken off the file. (*Att.-Gen.* v. *Fellows*, 1 J. & W. 254.) If a reprint is necessary, the Attorney-General signs it, otherwise he signs the draft or the original bill if he requires it; and, in that case, it must be taken to him for the purpose by the record and writ clerk.

In amending a bill, the character of the suit should be preserved (*Butterworth* v. *Bailey*, 15 Ves. 358; *Cholmondeley* v. *Clinton*, 2 Ves. & B. 113; *Tomson* v. *Judge*, 23 L. T. 217); but a prayer for an injunction may be added even after answer. (*Jacob* v. *Hall*, 12 Ves. 458.) If the plaintiff desires to strike out a defendant's name before appearance, he can do so as of course; but after appearance, the order must provide for his costs. A plaintiff's name may before appearance be struck out of course; but afterwards a special application and security for costs are necessary. (*Lloyd* v. *Makeam*, 6 Ves. 144.) Plaintiffs may be added by amendment after answer. (*Hichens* v. *Congreve*, 1 Sim. 500.) And even after replication leave to add parties by amendment may be obtained on motion ex parte. (*Bryan* v. *Wastell*, 23 L. T. 21.) But it does not appear that the order may not be discharged when such parties have appeared.

Orders of course for leave to amend, as specified in the

Orders of the 8th of May, 1845, may still be obtained; but special applications for such leave, which were formerly made to the master in ordinary, must now be made to the judge in chambers. The order of course is obtained on motion or petition of course; if the latter, it is obtained at the Rolls. The petition is on a 7*s.* stamp, and states the filing of the bill and answers with dates, or that no answer is put in, as the case may be, and that the plaintiff is advised to amend his bill; stating, also, what further answers are required or not, and if so from whom. It then prays for leave to amend accordingly. The order may be obtained the following day. Either the motion or the petition may be made or presented any day, whether in or out of term. The motion is quite of course, carrying a half-guinea fee to counsel. Where a defendant puts in a voluntary answer under the 15 & 16 Vict. c. 86, s. 13, plaintiff cannot obtain as of course an order to amend after four weeks from the time when the answer would be deemed sufficient. (*Rogers* v. *Fry*, 2 Eq. Rep. 253.)

If the application be a special one, a summons must be issued at chambers and served on all material defendants. The jurisdiction of the master in such cases is gone, the 35th section of the 15 & 16 Vict. c. 80, repealing the 13th, 14th and 15th sections of the 3 & 4 Will. 4, c. 94, from which he derived his power. By the 26th section of the act 15 & 16 Vict. c. 80, that power is conferred upon the judges, to be exercised, not in chambers only, but as from time to time they may think most convenient. It is, however, exercised in chambers. It must be borne in mind that the 67th and 68th Orders of May, 1845, apply to such cases, and the affidavits thereby required must be made. Upon a motion for leave to amend by striking out the name of a plaintiff, and making him a defendant, it was decided that the application must be supported by the affidavits required by those orders. (*M'Leod* v. *Lyttleton*, 1 Drewry, 36.)

After a demurrer overruled and a petition of appeal pre-

sented, answered and served, the plaintiff must not obtain the common order to amend pending such appeal, or it will be discharged with costs. (*Ainslie* v. *Sims*, 21 L. T. 135; and see *Lewis* v. *Cooper*, 10 Beav. 32; 12 Phill. 178.)

Under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both. (*Minn* v. *Stant*, 15 Beav. 129.)

On a motion to dismiss a bill for want of prosecution, the court will not without evidence on the part of the plaintiff or the defendant's consent, give leave to amend the bill. (*Freeston* v. *Claydon*, 22 L. J. 640.)

Upon a special application for leave to amend, the affidavit must not only show that due diligence has been used, but also state the circumstances which show that diligence and the materiality of the proposed amendments. (*Stuart* v. *Lloyd*, 3 Mac. & G. 181; 20 L. J. 329; 15 Jur. 411; see also *Collett* v. *Preston*, 3 Mac. & G. 432; 15 Jur. 975.)

The costs of an application to amend are in the discretion of the judge. (23rd G. O., Dec. 1833, as adapted to the present practice by the 58th G. O., 16th Oct. 1852.)

The amendments being settled and signed by counsel, may be introduced by written alterations in the original printed bill as filed, and by additions on the paper interleaved in those cases, where according to the practice before the operation of the act amendments might be made without new ingrossments (15 & 16 Vict. c. 86, s. 8, and 7th General Orders of 7th August, 1852, (A)), that is to say, where they do not in any one part exceed two folios, and can be conveniently interlined or interleaved in the original bill, otherwise the bill must be reprinted. Where this length is exceeded, there must be a reprint, although there may be room to add more on the paper interleaved. (*Stone* v. *Davies*, 1 Eq. Rep. 190; 21 L. T. 190; 17 Jur. 585.)

If the plaintiff's description is not the same as when the original bill was filed, the new description ought to be stated

in the amended bill. (*Kerr* v. *Gillespie*, 7 Beav. 269; 13 L. J. 135; 8 Jur. 50.)

The order to amend should be first served on all parties to the suit who have appeared, as it only operates from the time of service, and will not until served prevent the defendant from moving to dismiss the bill. (*Price* v. *Webb*, 2 Hare, 516; *Jones* v. *Lord Charlemont*, 17 L. J. 449; 12 Jur. 389.) Also the order must state if a further answer is not required. (*Boddington* v. *Woodley*, 9 Sim. 380.)

The amendments must of course be made within the time limited by the order to amend, when the time is thereby limited; and when not, then within the time limited, as already stated, by the 16th of the G. O. of 8th May, 1845, Articles 34 and 35; or an enlargement of the time must be obtained. (Order 114, Art. 3; *Bainbrigge* v. *Baddeley*, 12 Beav. 152; 18 L. J. 385; 13 Jur. 997.)

By the G. O. of the 12th May, 1838, it is provided, that whenever any bill upon the files of this court shall be amended, the record of such bill, when amended, shall be marked with the date of the order under which the same is so amended, and of the day on which such amendment is made, in manner and form following, *viz.*: "Amended —— day of ——, by order, dated —— day of ——;" and such amended bill shall, on the same day, be turned over into the study of the six clerk in whose division such bill is filed, in like manner as all other pleadings are turned over for filing; and the plaintiff's clerk in court shall, on the same day, give notice thereof at the seat of the defendant's clerk in court, or at the seats of all the clerks in court for the defendants, if more than one; and that the usual entry of such amendment, together with the aforesaid date of making such amendment, and the date of such entry, shall be made in the six clerk's book, and that such amended bill shall be deemed to be filed at and from the date of such entry. There being, however, no longer any six clerks or clerks in court, a portion of this order is inoperative.

The amendments being made, notice is not to be given as heretofore, but by actual service of a copy of the amended bill, it being provided by the last-mentioned section, that the same practice pointed out by the act for filing, serving and delivering printed copies of original bills and claims, shall apply to amended bills and claims so far as may be; and again (by the 9th General Orders of 7th August, 1852, (A)) that a copy of any amended bill or claim, whether by reprint or alteration, is to be served upon the defendant or his solicitor, and that when the amendment is not by reprint, the copy served may be partly printed and partly written, but that in every case the copy served must be stamped by the record and writ clerk, as in the case of an original bill. There should be a copy served for each defendant, although the service be effected on the solicitor.

As to bills filed after the 1st of November, 1852, the practice of amending the defendant's copy is abolished. (8th General Order of 7th August, 1852, (A).) Nothing is said in the acts or orders about an indorsement on the copies of the amended bill for service; but the same indorsement should be upon them as upon copies of an original bill, with a different date indicating the day when they were stamped by the record and writ clerk. Service on the defendant's solicitor in the cause is good service. (10th ibid.; 26th G. O., May, 1845.) But see *Marquis of Hertford* v. *Swisse*, where defendant was resident abroad. (13 Sim. 489.) And where the defendant has appeared in person and given an address for service under the 20th General Order of 26th October, 1842, service at that address is good service. (11th G. O., 7th August, 1852, (A).) The former practice will continue to prevail as to engrossing and filing bills, and issuing and serving subpœnas to appear to and answer them, and as to amending bills and issuing and serving subpœnas to appear and answer amended bills where necessary, or giving notice of the amendments, and as to amending the defendant's office copies, in all cases in which the original

bill was filed before the 2nd November, 1852. (12th and 13th ibid.)

The number of printed copies of an amended bill, to be delivered to the defendant or his solicitor for use throughout the cause, is, it is presumed, ten, irrespectively of the ten copies of the original bill already delivered, if such copies should happen to have been delivered before the amendment of the bill. The orders, however, do not provide us with any guide on this point, the 6th Order (of 7th of August, 1852, (A)) having reference only, it would seem, to copies of original bills and claims. The court may at the hearing of the cause direct such amendments to be made, as may be necessary in cases where there is a misjoinder of persons as plaintiffs, if it appears to the court that, notwithstanding a conflict of interest in the co-plaintiffs, or a want of interest in some, or the existence of some ground of defence affecting some or one of them, they or some or one of them are or is entitled to relief. (15 & 16 Vict. c. 86, s. 49.)

When a plaintiff amends his bill after having issued process of contempt, it is generally considered a waiver of that process; but a special power is given to the court to order an amendment, upon application, with notice to the defendant, without its operating as a discharge of that process. (1 Will. 4, c. 36, r. 10.) This provision is, however, confined to the case of a defendant who has been brought to the bar of the court for contempt in not answering, and who refuses or neglects to answer. An order to take a bill pro confesso is lost by obtaining an order to amend even a clerical error. (*Weightman* v. *Powell*, 18 L. J. 71; 12 Jur. 958.) And an injunction was held to be lost by amending an information by adding a plaintiff. (*Att.-Gen.* v. *Marsh*, 18 L. J. 272; 13 Jur. 317.)

It is presumed that the former practice should still be observed of paying 20*s.* at the time of serving the order, or at all events before amending the bill as to each set of defendants, from whom an answer is required to the amend-

ments; but whether that sum is to be paid to each set of defendants where a reprint of the bill is necessary, although no further answer is required, in analogy to the former practice in the case of a new engrossment, does not appear to be settled. The reason for such payment appears, however, no longer to exist. Under the 29th and 30th Orders of 1828, a defendant is allowed as costs in the cause his costs occasioned by any amendment of the bill, whether the plaintiff is allowed them or not (except where the amendment has been ordered specially by the court, or it appears to have been rendered necessary by the defendant's default), deducting, however, what the plaintiff shall have paid the defendant at the time of amending. And if the defendant is to pay the plaintiff his costs, he may deduct therefrom his own costs of such amendment, if the plaintiff is disallowed the costs thereof, as having been unnecessarily made.

It will be seen, infra, under title "*New Facts and Circumstances,*" that supplemental matter may be introduced by amendment into the original bill. A form of affidavit of service of an amended bill will be found, infra, under title "*Hearing of Claim.*"

DISMISSAL OF BILL AT PLAINTIFF'S INSTANCE.

Before decree, a plaintiff has a right by an order of course to dismiss his bill with costs as against all or any of the defendants. But where an appearance has not been entered by or for any defendants, as to them the dismissal will be without costs. (*Thompson* v. *Thompson,* 7 Beav. 350.) But whether or not this can be done after a general demurrer overruled on argument, see *Cooper* v. *Lewis* (2 Phil. 178). After decree, if it be desired to dismiss a bill, the cause must be reheard or the decree appealed from. (*Lashley* v. *Hogg,* 11 Ves. 602.) But further proceedings may be stayed after decree in proper cases.

The order of course to dismiss is obtained at the Rolls, on petition, merely stating shortly the proceedings had, and

that the matters in difference are accommodated, and praying that the bill may stand dismissed out of this court, with costs to be taxed by the proper taxing master [or without costs, as the case may be]. It may also be obtained, like other orders of course, by motion upon similar allegations, and without being mentioned to the court. When the order asked for is not strictly of course, as when a defendant is sought to be deprived of his costs, or when the costs are to be paid by any other party than the plaintiff, the consent of the defendant affected by that variation is necessary.

The 117th General Order, May, 1845, provides that, if the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, such dismissal is, unless the court otherwise orders, to be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

NEW FACTS AND CIRCUMSTANCES.
REVIVAL OF SUIT.
SUPPLEMENTAL BILL.

Facts and circumstances occurring after the institution of the suit may be introduced by amendment of the bill, if the cause is otherwise in a state to allow of an amendment. If not, the plaintiff should state such facts and circumstances on the record. In either case a supplemental bill is not necessary. (15 & 16 Vict. c. 86, s. 53.) The mode of stating the new facts and circumstances on the record, and putting them in issue, is by filing in the Record and Writ Office a statement, either written or printed, to be annexed to the bill, and such proceedings, by way of answer, evidence and otherwise, are to be had and taken upon the statement so filed, as if the same were embodied in a supplemental bill; but the court may make any order it shall think fit for accelerating the proceedings thereunder or proceedings therein in any manner which may appear just and practicable. (44th General Order, 7th August, 1852, (A).) The

statement to be filed must bear a 10*s*. Chancery stamp, and is engrossed on parchment.

Where a defendant died after decree, having devised his interest in the suit to his wife and children, the proper course, in order to bring them before the court, was stated by the Lord Chancellor to be to file a statement in the nature of supplemental matter under the last-mentioned order, and then to obtain a supplemental decree as of course. (*Hart* v. *Tulk*, 22 L. T. 192.) Yet in the case of *Commerell* v. *Bell* (18 Jur. 141; 22 L. T. 300), the Vice-Chancellor Kindersley decided that a supplemental statement cannot be filed after decree; and that new parties cannot be brought before the court by supplemental statement.

Though a defendant has the conduct of the cause, he is not therefore enabled to file a statement of facts or circumstances occurring after the institution of the suit, to be annexed to the bill. (*Lee* v. *Lee*, 9 Hare, App., 61.) But a defendant having the conduct of the suit, having filed a bill in the nature of a supplemental bill bringing an absent party before the court, a motion by the plaintiff in the original suit to take it off the file for irregularity was refused with costs. (*Lee* v. *Lee*, 17 Jur. 607; 22 L. J. 862.)

It would appear, from the General Orders of the court, that in suits instituted after the 1st November, 1852, the plaintiff should serve the statement of new facts and circumstances so filed on the defendant; for, according to those orders, we are to assume that a supplemental bill has been filed, and that an answer is to be put in; and as writs of subpœna to appear to and answer a bill are abolished as to suits commenced after that time, and as all bills must be served, according to the 15 & 16 Vict. c. 86, s. 3, a supplemental bill, or rather that which is to stand as its substitute, must, like the rest, be served also. It would appear therefore that there should be service of either a written or a printed copy of the statement upon the defendant, no power being given to serve a written copy, except in the three cases

mentioned in the 6th section, viz., the cases of injunction, ne exeat regno, and making an infant a ward of court; but how far this view agrees with the decision in *Hart* v. *Tulk*, supra, should be considered. No power is given to serve the defendant's solicitor. It is not necessary to obtain the leave of the court previous to filing such statement; nor will the court at the defendant's instance direct a plaintiff to alter or add to his record. (*Langdale* v. *Gill*, 20 L. T. 88.)

The interrogatories will afterwards be filed and served in the same manner as is pointed out (ante) with reference to an original bill, and the other proceedings for putting the cause at issue and proving the necessary facts and circumstances as if they were brought forward by original bill.

In a simple case, however, where a suit becomes abated by death, marriage or otherwise, or defective by reason of some change or transmission of interest or liability, it is provided by the 52nd section and the 43rd of the General Orders, 7th August, 1852, (A), that an order to the effect of the usual order to revive, or of the usual supplemental decree, may, without any bill of revivor or supplemental bill filed, be obtained as of course upon an allegation of the abatement of the suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties, who, according to the former practice, would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties, in the same manner in every respect as if such order had been regularly obtained according to the former practice of the court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; but it will be open to

the party or parties so served, if not under disability other than coverture, within twelve days after service, and if under disability other than coverture within twelve days after the appointment of a guardian or guardians ad litem, to apply to the court by motion or petition to discharge such order, on any ground which would have been open to him or them on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon. If, however, any party so served be under disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians ad litem shall have been duly appointed for such party, and twelve days thereafter shall have elapsed. (15 & 16 Vict. c. 86, s. 52; and 43 G. O., 7th August, 1852, (A).) There may be substituted service of the order to revive. (*Forster* v. *Menzies*, 21 L. T. 123.) An order in the nature of a supplemental decree may be obtained in a creditor's suit by a creditor who has proved his debt, the plaintiff having become bankrupt. (*English* v. *Hayman*, 9 Hare, App., 88.)

This section applies equally to cases which occurred before and after the operation of the act. (*Jones* v. *Woods*, *Cox* v. *Taylor*, 20 L. T. 50; *Lowes* v. *Lowes*, 16 Jur. 968; 20 L. T. 61.) The motion is quite of course, it being merely necessary to hand counsel's brief to the registrar in court. (*Bonfil* v. *Purchas*, 9 Hare, App., 52; 16 Jur. 965; *Finch* v. *Southee*, 20 L. T. 244.) If the new party served with the order does not enter an appearance as required by the act, it has been decided that the plaintiff may proceed under the 29th of the Orders of May, 1845, to enter an appearance for him. (*Cross* v. *Thomas*, 21 L. T. 2; *Forster* v. *Menzies*, 10 Hare, App., 36; 17 Jur. 657; 21 L. T. 123.) But in a more recent case, before V. C. Wood, his Honor, after consulting with the other judges, said, they were of opinion

that it was not necessary to enter an appearance, the intention of the legislature being to give the order to revive, under the new practice, the same effect which it had under the former practice, and that the suit was duly revived on service of the order to revive. (*Ward* v. *Cartwright*, 17 Jur. 781 ; 22 L. J. 1006.) And where the defendant served with the order to revive did not enter an appearance within eight days, nor apply to have the order discharged within the twelve days allowed for that purpose, but appeared by counsel on the hearing for further directions, the court refused an application to enter an appearance against him *nunc pro tunc*, on the ground that the order had become absolute, and that any appearance was unnecessary. (*Hanbury* v. *Ward*, 22 L. T. 183.)

It is not proper to file a bill of revivor, even where an admission of assets, or an account of the estate of a deceased defendant, is required, but an order to that effect would be obtained under the 52nd section. (*Edwards* v. *Batley*, 23 L. T. 241.) This section is applicable to the case of an official assignee whose predecessor, a defendant, has died without putting in his answer. (*Gordon* v. *Jesson*, 22 L. J. 328.)

The plaintiff having died, in a suit in which a decree had been made, Vice-Chancellor Kindersley held, on a motion to dismiss the bill under the 63rd Order of May, 1845, that as the decree had decided on the propriety of the suit, and either party might revive, and such an order might be taken in the absence of other parties, no order could be made; but on the authority of a case at the Rolls (*Price* v. *Berrington*, 11 Beav. 90), the motion was dismissed without costs. (*Mills* v. *Dudgen*, 21 L. T. 238.) And where, in a suit for specific performance, the defendant died after a report in favour of the title; upon a motion by his executors and devisees in trust, the Court of Appeal ordered that if the plaintiff did not revive within six weeks the bill should stand dismissed. (*Norton* v. *White*, 2 De G., M'N. & G. 678.)

A suit may abate as to particular interests, as by the death of one of several defendants having separate interests, or it may abate altogether, as by the death of a sole plaintiff. Upon the death of the plaintiff in a creditor's suit, after decree, without any representative, the court allowed a creditor to prosecute the suit without a bill of revivor. (*Brown* v. *Lake*, 2 Coll. 620.)

As to the non-abatement of suits by death, or removal of official and trade assignees, see 12 & 13 Vict. c. 106, s. 157, and *Lloyd* v. *Waring*, 1 Coll. 536; 8 Jur. 1134. After the appointment of a new assignee the court may order his name to be substituted for that of the former one. (*Mann* v. *Ricketts*, 1 Phil. 617; 7 Beav. 484; 9 Jur. 1103.)

As to the non-abatement of suits by death, resignation or removal of the solicitor to her Majesty's treasury, see 15 & 16 Vict. c. 3.

The marriage of a female plaintiff abates the suit, but that of a female defendant does not, it being sufficient to name the husband and wife in all future proceedings.

If no matter remains in the suit to be disposed of or prosecuted, except a matter of untaxed costs not payable out of a fund, it is an understood rule that the suit cannot be revived, though it is otherwise if the costs are taxed before abatement (see *Morgan* v. *Scudamore*, 2 Ves. 316), or are payable out of the estate. (*Jenour* v. *Jenour*, 10 Ves. 572; but see *Robertson* v. *Southgate*, 18 L. J. 404; 13 Jur. 533.)

It seems that when something beyond the mere order to revive and the usual supplemental decree is requisite, the new practice of obtaining an order of course does not apply, but a supplemental bill must be filed; as where a suit had been revived against one of several plaintiffs to the original suit, as the defendant to the revived suit. (*Yate* v. *Lighthead*, 16 Jur. 964; 20 L. T. 59.) The Master of the Rolls has also held, that the court has no jurisdiction to add to the common order to revive under the section in question. (*Dean*

and Chapter of Ely v. *Waddelow*, 20 L. T. 256.) So when a creditor so found by the master sought to revive, the Vice-Chancellor Stuart refused the order. (*Lowes* v. *Lowes*, 16 Jur. 991.) But the Lords Justices afterwards granted it, observing that the case, if not within the letter, was within the spirit of the 52nd section, and that "perhaps the application might have been made ex parte," which latter point, however, they did not expressly decide. (2 De G., M. & G. 784.) They have also held that the conveyance and transfer to trustees of a marriage settlement of a female plaintiff, a ward of court, of her interest in real and personal property, the subject of the suit, was a change or transmission of interest within the 52nd section, so as to warrant an order against the trustees to the effect of the usual supplemental decree. (*Atkinson* v. *Parker*, 16 Jur. 1005.) The birth, after the institution of a suit, of one entitled as one of a class, is a case within the 52nd section. (*Fullarton* v. *Martin*, 1 Drewry, 238.)

Where a bill had been dismissed with costs, and the plaintiff afterwards died, the Vice-Chancellor Kindersley, at the defendant's instance, granted an order to revive, observing that, as this would be done under the old practice, he did not see why the new practice should not be made to apply to the case. (*Petre* v. *Petre*, 21 L. T. 136.)

A motion to take a supplemental bill off the file for irregularity ought to be headed in the supplemental as well as in the original cause. (*Lee* v. *Lee*, 21 L. T. 147.)

The act 17 & 18 Vict. c. 100, gives the masters in ordinary powers to inquire and report respecting abatements of suits depending before them, and provides for their reports being brought before the Court with a view to the making of an order to revive or supplemental order, or to the further prosecution or final disposal of the cause. This act is more particularly noticed infra, in reference to proceedings in the master's office.

Under an order giving liberty to add parties by amend-

ment or supplemental bill, a plaintiff may do both. (*Minn* v. *Stant*, 15 Beav. 129.)

Under the 44th section of the act 15 & 16 Vict. c. 86, the court may either proceed in the absence of a person representing the estate of a deceased person, where there is no legal personal representative, or appoint a person to represent it for all the purposes of the suit or other proceeding, and the estate of the deceased person shall be thereby bound. This has been acted on in the cases of *Ex parte Cramer, re Stuart's Trusts*, 20 L. T. 87; and *Rogers* v. *Jones*, 16 Jur. 968; and 20 L. T. 50. The Vice-Chancellor Kindersley has, however, decided that where the estate of a deceased person forms the subject of the suit, such person could not be said to be interested in the matters in question within the meaning of this section, and held that it did not apply to such a case, and declined to proceed without a legal personal representative. (*Groves* v. *Lane*, 16 Jur. 1061. But see *Chaffers* v. *Headlam*, 20 L. T. 231.)

A defendant, found by the master to be a proper party to an administration suit, having died, administration to his estate was taken out, and a statement to that effect filed under the 44th G. O., 7th August, 1852, (A). On motion that the administrator might be, on the further hearing, deemed and taken to be a defendant, there being no exact course prescribed by the new acts and orders, Vice-Chancellor Kindersley said, that under the old practice a supplemental bill would have been filed, a short answer put in, and a decree taken against the administrator, and he thought it better to adopt that course now. (*Heath* v. *Chapman*, 17 Jur. 570; 1 Eq. Rep. 190.)

For other decided cases relating to this section see infra, "*The hearing of the Cause and the Decree thereon.*"

When there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff without interest, the court may, at the hearing of the cause, order the cause to stand revived, as may appear just, and proceed

to a decision of the cause, if it shall see fit, and give such directions as to costs or otherwise as may appear just and expedient. (15 & 16 Vict. c. 86, s. 49.)

The 39th General Order, 1828, provides, "That where any cause shall become abated, or shall be compromised, after the same is set down to be heard in either of the said two courts, the solicitor for the plaintiff shall also certify the fact, as the case may be, to the registrar of the court where the cause is so set down, who shall, in like manner, cause an entry thereof to be made in his cause-book; and the solicitor for the plaintiff shall be allowed the same fee of six shillings and eightpence for such certificate, if he shall certify the fact as soon as the same shall come to his knowledge."

JOINING ISSUE.

Issue is joined by filing a replication in the Record and Writ Clerks' Office and giving notice thereof.

A replication is still necessary in all cases in which it would have been required if the new acts and orders had not come into operation, except only where a decree or decretal order shall have been made under the 15th sect.; it is therefore necessary whenever the plaintiff intends to dispute any one statement in the answer of the defendant, with the exception just referred to; it is also necessary when a defendant is not required to answer and does not answer, (28th G. O., 7th Aug. 1852, (A),) and also where a traversing note has been filed, or the bill is taken pro confesso. Notwithstanding the filing of a replication, the plaintiff may read the defendant's answer in support of his case, or any portion of it, but the defendant cannot read it. Whether or not the answer should be replied to, will be advised upon by counsel; and where a replication is necessary, the time for filing it is hastened by the new practice only by shortening the time for pleading, answering and demurring, not demurring alone. The 26th sect. of the act 15 & 16 Vict. c. 86, provides, that in suits by bill in which a decree or

decretal order shall not have been made on motion under the 15th sect., the replication in use at the time of passing the act must be adopted for the purpose of joining issue.

This only applies to cases where the plaintiff intends to join issue, and is not intended to compel a plaintiff to join issue in all cases except where a decree or decretal order has been moved for and obtained. Although the section is perhaps not sufficiently explicit in this respect, yet it can scarcely be considered that where a defendant puts in an answer the plaintiff shall not be at liberty to give full credence to it, and proceed to a hearing upon such answer without replication. The same section also provides that where a defendant shall not have been required to answer, and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill; and the 28th of the General Orders, 7th August, 1852, (A), states, that in this last-mentioned case issue is nevertheless to be joined by filing a replication in the form or to the effect of the replication in use at the passing of the act. This does not, however, apply where a decree or decretal order is about to be moved for, though it does where the motion is made and fails. (*Duffield* v. *Sturgis*, 9 Hare, App., 87; 21 L. T. 205.) Nor does it apply to a plea to the whole bill. Nor where the defendant has been required to answer and has not answered, though the time for answering has expired; for in such a case the old practice of filing a traversing note must be resorted to, the Master of the Rolls having observed that the 26th sect. cannot be read disjunctively. (*Heath* v. *Lewis*, 17 Jur. 1090.) See "*Traversing Note.*"

The 93rd General Order of May, 1845, abolishes the old practice of issuing a subpœna to rejoin, and provides that only one replication is to be filed in each cause, unless the court otherwise orders; and that the replication is to be in the form set forth at the foot of that order, or as near thereto as circumstances admit and require; and that upon the

filing of such replication the cause is to be deemed to be completely at issue; and that each defendant may, without any rule or order, proceed to examine his witnesses, and the plaintiff may in like manner proceed to examine his witnesses, so soon as notice of the replication being filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed.

Form of Replication.

Between A. B. ..... Plaintiff;
and
C. D., E. F., G. H. &c. ..... Defendants.

The plaintiff in this cause hereby joins issue with the defendant C. D. [*all the defendants who have answered or pleaded, or against whom a traversing note has been filed*] and will hear the cause on bill and answer against the defendant E. F. [*all the defendants against whom the cause is to be heard on bill and answer*], and on the order to take the bill as confessed against the defendant G. H. [*as the case may be*].

The replication is on parchment without stamp. The name and address of the solicitor and agent is indorsed.

If a replication has been filed to some only of the answers, the court may, under the new practice, direct a replication to be filed to the answers filed since the first replication, notwithstanding the rule that there should be only one general replication in a suit. (*Rogers* v. *Hooper*, 22 L. T. 269.) In the earlier case of *Stinton* v. *Taylor*, (4 Hare, 608; 15 L. J. 321; 10 Jur. 386,) however, the court refused this order, considering that the replication already filed should be withdrawn, and a new one filed to all the answers.

The time within which a replication should be filed is regulated by the General Orders of May, 1845.

The 16th Order, Art. 37, provides, that the plaintiff (not obtaining an order for leave to amend his bill) must either file his replication or set down the cause to be heard on bill and answer, within four weeks after the last answer is deemed or found to be sufficient. Otherwise any defendant may move to dismiss the bill for want of prosecution.

The same Order, Art. 39, provides, that where the plaintiff amends his bill without requiring an answer to the amendments, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the notice of the amendment of such bill, the plaintiff is, after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication or to set down the cause to be heard upon bill and answer. Otherwise any defendant may move to dismiss the bill for want of prosecution.

For the word "warrant," in the last-mentioned article, substitute "summons;" and for the words "notice of the amendment of such bill," substitute "copy amended bill," and thus this article will be made to work into the new practice.

The same Order, Art. 40, provides, that where the plaintiff amends his bill without requiring an answer to the amendments, and a defendant, within eight days after the service of the notice of the filing of the amended bill, serves a warrant for further time to answer the amendments, but the Master refuses to grant such further time, the plaintiff is, within fourteen days after such refusal, either to file his replication or to set down the cause to be heard on bill and answer. Otherwise any defendant may move to dismiss the bill for want of prosecution.

The same Order, Art. 41, provides, that if a defendant puts in an answer to amendments to which the plaintiff has not required an answer, the plaintiff must, within fourteen days after the filing of such answer, either file his replication or set down the cause to be heard on bill and answer, unless, in the mean time, he obtains from the court a special order for leave to except to such answer or to amend the bill. Otherwise any defendant may move to dismiss the bill for want of prosecution.

The times of vacation are not to be reckoned in the computation of the times appointed or allowed for filing replica-

tions or setting down causes under this article; which does not apply to replications generally. (*Stinton* v. *Taylor*, 4 Hare, 608; 15 L. J. 321; 10 Jur. 386.)

The 114th Order declares, that any defendant may upon notice move the court that the bill may be dismissed with costs for want of prosecution, and the court may order accordingly; if the plaintiff, having undertaken to reply to a plea to the whole bill, does not file his replication within four weeks after the date of such undertaking.

The court may enlarge the time for filing replication, which now, it is presumed, may be done on a summons being taken out for that purpose at chambers. (See on this point, *Stinton* v. *Taylor*, supra; *Dalton* v. *Hayter*, 9 Jur. 1000; and the G. O. of May, 1845, Order 21; Art. 1 of Order 114; and Order 115.)

The notice of filing, although not required to do so, usually contains a copy of the replication. It must be served the same day on the solicitor of the adverse party, or on the party himself, if he acts in person. (23rd G. O., October, 1842. All notices must be served before eight o'clock in the evening, otherwise they will be deemed to have been served on the following day. (22nd ibid.) The course of the defendant is to apply for an extension of the time allowed for taking the next step in the cause, when the plaintiff omits to serve the notice at the proper time. (*Wright* v. *Angle*, 6 Hare, 107; 17 L. J. 29; 11 Jur. 987.)

Where a defendant not being required to answer had absconded, and the plaintiff had caused an appearance to be entered for him, the Lord Chancellor and Lords Justices ordered notice of filing replication under the 28th Order of 7th August, 1852, (A), to be served at the defendant's last known place of abode, with directions to advertise in the Gazette and two county newspapers circulating in the locality in which the defendant resided. (*Barton* v. *Whitcomb*, 22 L. J. 523; 17 Jur. 81; 20 L. T. 214.)

A replication may be withdrawn where the circumstances

will warrant that course, upon an order of the court for that purpose, which may be obtained at chambers. But not after witnesses have been examined. (*Gascoyne* v. *Chandler*, 3 Swanst. 420; *Bousfield* v. *Mould*, 1 De G. & S. 347.)

ENLARGING PUBLICATION OR THE TIME FOR CLOSING EVIDENCE.

Applications to enlarge publication, or what is termed under the new practice the time for closing evidence, will now be made to the judge in chambers upon a summons issued for that purpose, and sealed by the judge's clerk. The summons is prepared by the solicitor on a 3*s.* chancery stamp, together with a plain copy to leave at chambers. The masters in ordinary, who until recently disposed of such matters under the authority of the 13th, 14th and 15th sections of the 3 & 4 Will. 4, c. 94, have ceased to have jurisdiction, those sections being repealed by the 35th section of the act 15 & 16 Vict. c. 80; the 26th sect. of which last mentioned act confers the necessary power upon the judges, to be exercised, not only in chambers, but as from time to time they may think most convenient. The present arrangement is that such business be transacted in chambers. On the return of the summons, if an order be made, the solicitor must furnish the form of order, bearing a 5*s.* chancery stamp, which, when filled up, will be signed by the chief clerk. This application should be supported by an affidavit of merits, accounting for time past, and showing a case for further time. The office copy and not the original affidavit is read in chambers, and notice of the intention to read it should be given to the opposite party or parties. (24th G. O., 16th October, 1852.)

As to receiving further evidence after the time for closing evidence has expired, and even after the cause is in the daily paper for hearing, see *Hope* v. *Threlfall*, 17 Jur. 1021, and cited, post, p. 123.

EVIDENCE FOR THE HEARING.

Replication having been filed, the plaintiff's solicitor should proceed to enter into evidence for the hearing, if any be required. If issue was joined in the cause on or before the 20th January, 1855, the evidence must be taken according to the practice created in 1852, unless by consent or special order of the court the more recent practice is to be observed. (7th G. O., 13th January, 1855.) [See post.]

If by consent or special order the old practice is to be followed, the opinion of counsel on evidence being in all cases first taken, counsel will be instructed by the plaintiff's solicitor to prepare and sign the necessary interrogatories for the examination of the plaintiff's witnesses; and such interrogatories being engrossed on parchment, and filed at the office of one of the examiners of the court, an appointment will be given by the examiner's clerk for the examination of such witnesses, who being served with the subpœnas ad test. or duces tecum, as the case may be, and with the accompanying notices appointing the time for their examination, such notices being previously obtained from the examiner's office, and supplied with the necessary expenses, the plaintiff's solicitor will attend them severally on their examination at the time appointed. Frequently, however, the service of the subpœna, as well as of the notice, is dispensed with, but this can only be done with safety in the cases of witnesses whose attendance can be well depended on.

The writ of subpœna is now issued at the Record and Writ

. .

Office, upon a præcipe containing the short particulars of the writ, and bears a chancery stamp of 5*s*.

The following form is sanctioned by the 24th General Order of May, 1845.

Subpœna ad Testificandum or Duces Tecum.

Victoria, &c.

To greeting.

We command you [and every of you], that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. ——, one of the examiners of witnesses in our High Court of Chancery, at his office in Rolls Yard, Chancery Lane, London, at such times as the bearer hereof shall by notice in writing appoint, [*or* before E. F. or G. H. commissioners appointed for the examination of witnesses in our Chancery, at such times and places as the bearer hereof shall by notice in writing appoint], to testify the truth according to your knowledge in a certain cause depending in our said Court of Chancery, wherein A. B. [and others, *or* another, are, *or*] is plaintiff [*or* plaintiffs], and C. D. [and others, *or* another, are, *or*] is defendant [*or* defendants], on the part of the —— [*in case of subpœna duces tecum, add,* and that you then and there bring with you and produce, &c.] And hereof fail not at your peril.

Witness, &c.

ROMILLY, M. R.

The name and address of the solicitor and agent must be on the back of the writ (3rd G. O., Dec. 1833); and the names of three witnesses may be included in each subpœna. (5th and 6th ibid.)

If a witness is in prison an order of course for a writ of habeas corpus may be obtained to bring him up, or an order for the examiner to attend him and take his evidence. The service of any subpœna, except a subpœna for costs, is of no validity if not served within twelve weeks after the teste of the writ. (16th G. O., May, 1845, Art. 1.) The service

must be personal, and the original writ should be produced at the time of delivering the copy and examiner's notice.

An ordinary witness may be committed for contempt, if after due service of the subpœna he neglects to attend (*Hennegal* v. *Evance*, 12 Ves. 201), but a witness having the privilege of parliament is subject to sequestration.

The court may prescribe the mode of taking the evidence under the 15 & 16 Vict. c. 86, s. 28. (See also *Howard* v. *Howard*, 1 Drewry, 239, and 7th G. O., 13th Jan. 1855); or this may be arranged by consent of the parties (39th G. O., 7th August, 1852, (A); *M'Intosh* v. *Great Western Railway Company*, 20 L. T. 77; 16 Jur. 1012; *Cable* v. *Cooper*, 16 Jur. 969; 20 L. T. 60; 7th G. O., 13th Jan. 1855); and the court may make a special order even after witnesses have been examined under the old practice, the court suppressing, by consent, those depositions. (—— v. ——, 16 Jur. 1129.)

Until very recently, when evidence was to be taken according to the new practice, the plaintiff's solicitor had to determine whether he would prefer to have it taken by affidavit, or whether it should be oral; and having satisfied himself on this point, he must within seven days after issue joined have given notice to defendant that he desired that the evidence to be adduced in the cause should be taken orally or upon affidavit, as the case might be; and if he failed to do this, or if he did it and by the notice desired the evidence to be by affidavit, and no defendant did within fourteen days after the expiration of such seven days give notice to the contrary, the evidence was to be by affidavit. (15 & 16 Vict. c. 86, s. 29.) But now, by the 4th General Order, 13th January, 1855, it is provided that it shall not be competent for the plaintiff or any defendant to require by notice or otherwise that the evidence to be adduced in a cause shall be taken orally, but when issue shall have been joined

in any cause, the plaintiff and defendant respectively shall be at liberty to verify their respective cases either wholly or partially by affidavit, or wholly or partially by the oral examination of witnesses before one of the examiners of the court, or before an examiner to be specially appointed by the court.

The court cannot, without special reasons applicable to the particular circumstances or to particular witnesses, interfere with the agreement between the parties themselves that the evidence shall be taken orally. (*Rogers* v. *Hooper*, 22 L. T. 269.)

The 28th section of the 15 & 16 Vict. c. 86, provides that the court may order any witness or witnesses, either within or without the jurisdiction of the court, to be examined upon interrogatories according to the old practice, and that in such cases such practice shall remain in full force, save so far as the same may be varied by any General Order of the Lord Chancellor in that behalf, or by any order of the court with reference to any particular case.

This section also abolishes the old practice as to the examination of witnesses so far as it is inconsistent with the act.

By the 36th section, by consent or by leave of the court, affidavits by particular witnesses, or as to particular facts or circumstances, may be used on the hearing of any cause, and such consent, with the approbation of the court, may be given by or on the part of married women or infants, or other persons under disability.

But although the evidence generally be taken by affidavit, yet if it be desired to cross-examine, or, after a cross-examination, to re-examine, a witness who has made an affidavit, filed by a party at the hearing, it shall be done orally. (15 & 16 Vict. c. 86, s. 38.)

Commissions for the examination of witnesses within the jurisdiction of the court are no longer necessary (15 & 16

Vict. c. 86, s. 35); but where the examination cannot take place before one of the examiners of the court, an examiner may be specially appointed under the 31st section of 15 & 16 Vict. c. 86; and the application should be made in court and not at chambers. (*M'Neill* v. *Acton*, 20 L. T. 154; 22 L. J. 584.) See also *Reed* v. *Prest*, 1 Kay, App., 14. But in the case of *Williams* v. *Williams*, 10 Hare, App., 45, the practice of obtaining the order at chambers was recognized.

Commissioners appointed to take evidence need not generally be barristers. (*Henderson* v. *Philipson*, 17 Jur. 615.) But where the evidence was of a special nature, and the witnesses resided more than twenty miles from London, a barrister to be chosen by both parties was ordered to be appointed the examiner, although the plaintiff moving had asked that a solicitor might be appointed; but the court also said, that in case of witnesses residing so far from London the old practice remained unchanged. (*Reed* v. *Prest*, 1 Kay, App., 14.)

If, under the special circumstances of the case, or for any other reason, the court should think proper to direct a commission to issue, which it has still power to do, the old practice will be followed. The application should be supported by affidavit of the party or his solicitor, but was held sufficient if made by the clerk of the solicitor. (*M'Hardy* v. *Hitchcock*, 11 Beav. 93; 17 L. J. 256; 12 Jur. 367.) It should show the necessity for the commission, and that it was not intended for delay. The subject of the examination need not be stated; nor the names of the witnesses. (Ibid.) When the order has been served four days, the opposite party should be required to join in commission and strike commissioners' names. Each party names his commissioners, usually four each, unless circumstances render it desirable to increase that number; and at the time appointed each party strikes out two of the opposite party's names, or half as many as each one

has named, leaving the remainder as the commissioners to whom the commission is to be directed. The commission bears a 20*s.* chancery stamp, and is made returnable "without delay;" is sealed by the record and writ clerk on being presented to him for that purpose by the solicitor, who at the same time hands in a præcipe and the order directing the commission to issue. Within the realm, commissioners may compel the attendance of witnesses. (See infra, p. 111.) If foreigners are to be examined, the order should empower the commissioners to appoint an interpreter. (*Lord Belmore* v. *Anderson*, 4 Bro. C. C. 90.) All exhibits should be clearly identified, and marked and signed by the commissioner. If the depositions are in a foreign language, there must be an order appointing a person to translate them, who must attend at the Record and Writ Office for that purpose. (*Fanquire* v. *Tynte*, 7 Ves. 291.) The common forms of commissions and the oaths may be obtained at a law stationer's.

Commissions may also be dispensed with for examination of witnesses out of the jurisdiction, and an examiner may be specially appointed to take the evidence vivâ voce. Under special circumstances an examiner may be appointed to take evidence in London. (*Brennan* v. *Preston*, 1 Eq. Rep. 51; 10 Hare, App., 17.) And where it was uncertain whether a witness resided in Melbourne or Adelaide two examiners were appointed, each with power to act, with liberty to a defendant to appoint a person in the colony to attend on his behalf. (*Crofts* v. *Middleton*, 9 Hare, App., 70—75; 17 Jur. 112.)

As to Evidence generally.—A witness may, under special circumstances, be examined before the usual time, and indeed at any period of the suit, if there be reason to suppose that, from his being about to leave the country, or from ill health, or great age, his evidence may be lost to the

party requiring it, and it cannot be supplied from another source. This is called an examination *de bene esse*, and the depositions can only be used in the event of the witness not being living or able to give evidence at the proper time. It is necessary to obtain an order for such an examination generally on petition of course at the Rolls; but if by reason of the witness being the only witness who can depose to the matter in question, notice of motion should be given to the opposite party, and the affidavit in support should disclose the matter to be deposed to and the reasons for believing that another witness could not be obtained. (*Hope* v. *Hope*, 3 Beav. 317.) A plaintiff or a defendant may be examined *de bene esse* under the act 14 & 15 Vict. c. 99. (See *Forbes* v. *Forbes*, 9 Hare, 461; 22 L. J. 144.) Generally, however, an affidavit of age, ill health, &c., and materiality of evidence, is sufficient. As the reading of depositions taken *de bene esse* depends on the fact that the examination of the witness in the ordinary way cannot be obtained, the publication of such depositions can only take place by order of the court, to be obtained on motion with notice supported by affidavit. An examination *de bene esse* is subject to the same regulations in all respects as an ordinary examination.

When witnesses are examined *de bene esse* the examination must in general, and unless improper under the special circumstances of each case, be *vivâ voce*, in manner directed by section 28 of the act 15 & 16 Vict. c. 86; the evidence will, therefore, be known to the parties though not published to the world. (*Cook* v. *Hall*, 16 Jur. 1008.)

The court will not appoint two examiners; if the parties cannot agree, the matter must be referred to chambers. (Ibid.; 9 Hare, App., 22.)

Although the court is not expressly authorized to treat defendants' answers as affidavits at the hearing, yet where

defendants submit to be cross-examined as if they were witnesses making affidavits to be used on the hearing, the court will order their answers to be read at the hearing as affidavits. (*Howell* v. *Williams*, 20 L. T. 274.)

The court gave effect to the accuracy of a witness's testimony after an interval of fourteen years without requiring him to be produced in court. (*Petty* v. *Petty*, 17 Jur. 648; 22 L. J., 1065.)

By the 42nd General Order of August, 1841, it is provided that where a defendant in equity files a cross bill for discovery only against the plaintiff in equity, the answer to such cross bill may be read and used by the party filing such cross bill in the same manner and under the same restrictions as the answer to a bill praying relief might then be read and used.

A plaintiff may compel a defendant to give evidence under the authority of the 14 & 15 Vict. c. 99, s. 2. (*Harford* v. *Rees*, 20 L. T. 232.)

If it be intended to use on the hearing of a cause any affidavit or deposition filed before issue joined, the party desiring to do so must, within one month after issue joined, or such longer time as may be allowed by special leave of the court, give notice in writing to the opposite party of such intention, or he must obtain a special order to enable him to use such affidavit or deposition, otherwise such evidence is not receivable. (6th G. O., 13th January, 1855.)

The 22nd section of the statute 15 & 16 Vict. c. 86, has a retrospective operation, so as to let in affidavits sworn before the working of the act, and proof of signature is not necessary. (*Bateman* v. *Cooke*, 17 Jur. 170; 21 L. T. 1.)

Proof is required of the signature of a registrar of deeds in a colony to a certificate of registration, he not being authorized to administer an oath. Such document is not within the section. (*Bailie* v. *Jackson*, 17 Jur. 170; 21 L. T. 1.)

The clerks of records and writs are bound to furnish certified copies of Chancery pleadings on application, under the 14th section of the act 14 & 15 Vict. c. 99. (*Reeve* v. *Hodson*, 22 L. J. 696.)

Extracts from parish registers of entries of marriages, baptisms and burials, purporting to be signed by the incumbents of the respective parishes, are receivable in evidence, under the 14 & 15 Vict. c. 99, without any further verification. (*In re Neddy Hall's Estate*, 9 Hare, App., 17.)

A Scotch probate is not recognized by the Court of Chancery in England. (*M'Donald* v. *Bryce*, 17 Jur. 335; 22 L. J. 779.)

A witness proving a deed must prove the execution thereof by the party as well as his own attestation. (*Loxley* v. *Hill*, 3 Madd. 370.) If a deed is lost or destroyed, upon proof thereof secondary evidence of its contents may be given. (*Green* v. *Bailey*, 15 Sim. 542; 11 Jur. 258; *Saltern* v. *Melhuish*, 1 Amb. 247.) It need not in that case be proved that the original deed was stamped. (*Hart* v. *Hart*, 5 Jur. 1007.)

Documents thirty years old and upwards prove themselves.

The proof of matters in dispute has been greatly facilitated of late years by various acts, both as to documentary evidence and otherwise, as follows:—

The 3 & 4 Vict. c. 92, ss. 9—10, provides, that extracts from registers or records granted by the Registrar General, and purporting to be stamped with his seal of office, shall be received in evidence in all civil cases, instead of the production of the original registers or records containing such entries.

The 6 & 7 Vict. c. 82, s. 5, provides, that if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any commission for the examination of witnesses in England, Ireland or Scotland (such notice being signed by the commissioner or commissioners, and specifying the time and place of attend-

ance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the court or judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named or the production of any writings or documents to be mentioned in such rule or order.

The 6th section of the same act provides, that upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland, it shall be competent to the lord ordinary on the bills, upon an application made to him by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order.

The 7th section of the same act provides, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expenses and for loss of time as for and upon attendance at any trial in a

court of law; and that no person shall be compelled to produce under such rule or order any writing or other document that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order.

The 6 & 7 Vict. c. 85, s. 1, provides, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having, by law or by consent of parties, authority to hear, receive and examine evidence (*a*); but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively; provided also, that this act shall

(*a*) So much of this section as relates to husbands and wives is repealed by the 16 & 17 Vict. c. 83, s. 4, which act, with the exception of particular cases, renders such persons competent witnesses, see infra, page 117.

not repeal any provision in a certain act passed in the session of parliament holden in the seventh year of the reign of his late majesty and in the first year of the reign of her present majesty, intituled "An Act for the Amendment of the Laws with respect to Wills:" provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

The 8 & 9 Vict. c. 113, s. 1, provides, that whenever by any act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

The 2nd section of the same act provides, that all courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers

shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate or other judicial or official documents.

The 3rd section of the same act provides, that all copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the crown or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices and others, without any proof being given that such copies were so printed.

The 13 & 14 Vict. c. 35, s. 28, provides, that, notwithstanding any rule or practice of the said court to the contrary, it shall be lawful for the said court, at the hearing of any cause or of any further directions therein, to receive proof by affidavit of all proper parties being before the court, and of all such matters as are necessary to be proved for enabling the said court to order payment of any monies belonging to any married woman, and of all such other matters not directly in issue in the cause as in the opinion of the said court may safely and properly be so proved.

This provision has now been greatly extended by the new practice, as already shown.

The 14 & 15 Vict. c. 99, s. 2, provides, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by

deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding.

A plaintiff may compel a defendant to give evidence. (*Harford* v. *Rees*, cited ante, p. 110.) But a married woman, who was a party to the suit, could not be examined for or against her husband, nor the husband against the wife. (*Alcock* v. *Alcock*, 21 L. J. 856; 16 Jur. 653; *M'Neille* v. *Acton*, 17 Jur. 661.) It is not now necessary to obtain an order to examine a party to the suit. (*Swann* v. *Wortley*, 9 Hare, 460; 22 L. J. 74.)

The 3rd section of the last-mentioned act provides, that nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

The 14th section of the same act provides, that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law or by consent of parties, authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same,

upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

The 16th section empowers every person who, by law or by consent of parties, is authorized to hear, receive and examine evidence, to administer an oath to witnesses legally called before them.

The 16 & 17 Vict. c. 83, s. 1, provides, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any court of justice, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding.

The 2nd section of the same act provides, that nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.

The 3rd section of the same act provides, that no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

Proof of Documents vivâ voce.—Documents requiring proof of handwriting *only* may be proved vivâ voce at the hearing of the cause. A will of real estate cannot be proved in this manner, it being necessary in that case to show the sanity of the testator, which cannot be done at the hearing

(*Harris* v. *Ingledew*, 3 P. W. 93); unless the court thinks proper to require the witness to attend under the provisions of the 15 & 16 Vict. c. 86, which, however, cannot be reckoned upon. The execution of a deed may be proved vivâ voce on behalf of the plaintiff at the hearing, though the answer has not been replied to and does not deny the execution. (*Chalk* v. *Raine*, 7 Hare, 393; 18 L. J. 472; 13 Jur. 981; see also *Rowland* v. *Sturgis*, 2 Hare, 520; and contra, the earlier case of *Jones* v. *Griffiths*, 14 Sim. 262; 8 Jur. 733.) It would appear, however, that deeds, the execution of which is denied, should be proved before the hearing in the usual way after replication. So also a deed executing a power given by a former deed; such power to be exercised in the presence of and attested by witnesses. (*Brace* v. *Blick*, 7 Sim. 619.) So, where fraud is charged. (*Barfield* v. *Kelly*, 4 Russ. 355.) A document not proved at the original hearing cannot be proved vivâ voce on further directions (*Blundell* v. *Gladstone*, 11 Sim. 489), though it is otherwise on a re-hearing. (*Herring* v. *Cloberry*, 1 C. & P. 251.) When a witness is examined vivâ voce to prove handwriting only, the opposite counsel or solicitor has no right as of course, and in the absence of any special grounds, to inspect the documents placed in the witnesses' hands. (*Lord* v. *Colvin*, 18 Jur. 253; 22 L. T. 340.)

An order is obtained on a motion or petition of course, specifying the documents proposed to be proved at the hearing. If on motion, the motion paper should be indorsed to move for order that plaintiff may, at the hearing, be at liberty to prove by affidavit, or by the examination of witnesses vivâ voce, the documents within specified, saving just exceptions. It requires only the signature of counsel and the registrar's mark. If on petition the order will be granted at the Rolls Office, upon a petition being presented setting forth the documents. The practice of proving these exhibits by affidavit was introduced by the 43rd G. O. of August, 1841, which provides that, in cases in

which any exhibit might by the then practice of the court be proved vivâ voce at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same vivâ voce at the hearing. The order may be obtained even after the affidavit has been made (*Clare* v. *Wood*, 1 Hare, 314; 6 Jur. 165); and although a copy of the order should regularly be served two clear days before the hearing, it is within the author's experience that an order was allowed to be obtained during the hearing of the cause, but this should not be regarded as a precedent. If the proof be by examination in court, the attendance of the witness can be compelled, as in other cases, by subpœna.

Letters written "without prejudice," with a view to a compromise, cannot be given in evidence; and any attempt to use in evidence letters written "without prejudice" is disapproved of. (*Hoghton* v. *Hoghton*, 15 Beav. 278; 17 Jur. 99; 21 L. J. 482; *Jones* v. *Foxall*, 15 Beav. 388; 21 L. J. 725.)

Mode of Proceeding on the Oral Examination of Witnesses.—Witnesses to be examined orally shall be so examined by or before one of the examiners of the court or an examiner to be specially appointed by the court, the examiner being furnished by plaintiff with a copy of the bill and of the answer, if any, and such examination shall take place in the presence of the parties, their counsel, solicitors or agents; and the witnesses so examined shall be subject to cross-examination and re-examination, and such examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad and not expected to be present at the trial of a cause (15 & 16 Vict. c. 86, s. 31); the practice at common law in such cases being to adopt the rules applied to a trial at nisi prius, both as to the examination of the witness and the production of documents by him. The Court of Appeal observed with reference to this section, that that mode of examination does

not go to the point of substance—either what questions are to be put upon the examination, or what evidence, or what documents, are to be produced upon that examination taking place. (*Lord* v. *Colvin*, 22 L. T. 340.)

Examiners appointed by order of the court for the examination of witnesses have the like power of administering oaths as commissioners had under commissions. (15 & 16 Vict. c. 86, s. 35.)

The depositions taken upon oral examinations are to be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness and signed by him in the presence of the parties or of such of them as may think fit to attend. In case the witness shall refuse to sign the depositions the examiner shall sign the same, and may upon all examinations state any special matter to the court as he shall think fit. The depositions must be taken down in the examiner's own handwriting, this duty being imperatively required by the act. (*Stobart* v. *Todd*, 18 Jur. 618; 23 L. T. 225.) The 3 & 4 Will. 4, c. 94, s. 27, and the 107th Order of May, 1845, require that all depositions of witnesses shall be taken and expressed in the first person of the deponent.

It shall be in the discretion of the examiner to put down any particular question or answer if there should appear sufficient reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just. (15 & 16 Vict. c. 86, s. 32.)

When a witness refuses to be sworn or to answer any law-

ful question the same course is to be adopted with respect to him as at the time of the passing of the act was pursued in the case of a witness produced for examination before an examiner of the court upon written interrogatories, and so refusing. (15 & 16 Vict. c. 86, s. 33.)

The practice in such cases was to obtain the examiner's certificate, and upon that and an affidavit of service of the subpœna, an order of course was obtained for the witness to comply within four days or stand committed; and if after service of that order he still refused, either another order for his committal might be obtained upon a similar certificate of the examiner, and an affidavit of service of the order, or the first order might be enforced by attachment under the Orders of August, 1841.

Demurrers or objections of witnesses to questions put to them are to be taken down by the examiner and transmitted by him to the record office of the court, to be there filed, and their validity shall be decided by the court, and the costs of and occasioned by such demurrers or objections shall be in the discretion of the court. (Ibid.) The cases in which a witness may demur or object to answer particular questions are where he might criminate himself (*Paxton* v. *Douglas*, 16 Ves. 242), and where it would involve a betrayal of professional confidence; but it is no ground for such objection that the questions are not pertinent to the issue (*Ashton* v. *Ashton*, 1 Vern. 165), or that they relate to a private matter between the witness and another. (*Tipping* v. *Coates*, 17 L. J. 17, 337.) Where the commissioner took upon himself to examine a witness notwithstanding her demurrer, the court held that the deposition must be suppressed, although upon hearing the demurrer, it was held to be untenable. (*Goodale* v. *Gawthorne*, 4 De G. & S. 97.) And where the commissioner did not inform the witness that her reasons for her demurrer should be stated on oath, her demurrer was held not invalid because she was not sworn to the truth of

such statement. (Ibid.) The commissioner ought to be served with a petition to suppress the depositions, otherwise as against him it will be dismissed, with costs. (Ibid.)

The time allowed by the new practice for entering into evidence for the hearing is regulated by the 38th section and the 5th G. O., 13th January, 1855, which provide that the evidence on both sides, in any cause to be used at the hearing thereof, whether taken upon affidavit or orally (and including the cross-examination and re-examination of any witness or witnesses), is to be closed within eight weeks after issue joined, except that any witness who has made an affidavit to be used by any party at the hearing shall be subject to oral cross-examination by or before an examiner within one month after the expiration of such period of eight weeks, and after such cross-examination may be re-examined orally, or by or on the part of the party filing such affidavit, and such witness shall be bound to attend for such purposes; as to which, however, see also "*Cross-Examination and Re-Examination of Witnesses.*"

But if the *nine* [now reduced to *eight* by the G. O. just referred to] weeks after issue joined within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such *nine* [*eight*] weeks within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively is extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order; provided always, that, in cases where the above-mentioned period of *nine* [*eight*] weeks shall be so extended, the month during which a witness is subject to cross-examination, shall be taken to commence from the expiration of such extended period. (1st G. O., 1st June, 1854.)

The court may enlarge the time for closing the evidence. (15 & 16 Vict. c. 86, s. 38.)

The 38th section also enacts, that after the time fixed for closing the evidence no further evidence of any kind shall be receivable without special leave of the court previously obtained.

The court, under this section and the special circumstances of the case, allowed the plaintiff to adduce further evidence after the cause had appeared in the daily paper for hearing, reserving all right of cross-examination to the defendant. (*Hope* v. *Threlfall*, 17 Jur. 1021.)

The application to enlarge the time is to be made ordinarily by summons at chambers. An affidavit of the propriety and necessity for the application is necessary. The summons should be served on all parties entitled to examine witnesses. (*Brydges* v. *Branfell*, 9 Sim. 643.) If the application is granted, all parties entitled to examine witnesses may avail themselves of the extension of time. The powers given by the 23rd General Order of December, 1833, to the masters in reference to the costs of the application may be exercised by the judges. That order gives them liberty to order and direct whether the costs of the application shall be costs in the cause, or whether such costs or any part thereof shall be paid by any of the parties personally; and in the latter case the order shall fix the sum, or the costs may be taxed at the judge's discretion, and a subpœna may be sued out for the same.

Parties may abstain from filing their affidavits till the last hour of the day fixed for closing the evidence in the cause; and by the words in the 38th section, "no further evidence shall be receivable without special leave of the court," is meant that special grounds shall be shown by the party applying, and the court of appeal held it insufficient to show that such party having received notice of filing affidavits by the other side only on the last day of the time fixed by an

order enlarging the time for closing the evidence, he took copies and submitted them to counsel, who therefore advised him to enter into evidence, although before he had seen those affidavits he had advised him not to do so. (*Thompson* v. *Partridge*, 17 Jur. 1108.)

Cross-Examination and Re-Examination of Witnesses.—Witnesses examined orally before an examiner shall be subject to cross-examination and re-examination, which shall be conducted as nearly as may be in the mode now in use in the courts of common law with respect to a witness about to go abroad and not expected to be present at the trial of a cause. (15 & 16 Vict. c. 86, s. 31.)

The practice at common law in that case is to conduct the examination by the same rules as if the witness were being examined on a trial at nisi prius, and the witness may withhold documents, the production of which would not be compelled on a trial at nisi prius.

The cross-examination and re-examination of witnesses for the hearing shall be closed within eight weeks after issue joined, except as to witnesses who have made affidavits to be used at the hearing; and such witnesses may be cross-examined orally by or before an examiner within one month after the expiration of such eight weeks, and after such cross-examination may be re-examined orally, or by or on the part of the party filing such affidavit, and such witnesses are bound to attend before such examiner to be cross-examined and re-examined upon receiving due and proper notice and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of subpœna ad testificandum before such examiner; and the expenses attending such cross-examination and re-examination are to be paid by the parties respectively in like manner as if the witnesses so to be cross-examined were the witnesses of the party cross-examining, and shall be deemed costs in the

cause of such parties respectively, unless the court shall otherwise direct. (15 & 16 Vict. c. 86, s. 38, and 5th G. O., 13th January, 1855.)

If the *nine* [now by the last-mentioned G. O. reduced to *eight*] weeks after issue joined within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such *nine* [*eight*] weeks within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively is extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order; provided always, that, in cases where the above-mentioned period of *nine* [*eight*] weeks shall be so extended, the month during which a witness is subject to cross-examination, shall be taken to commence from the expiration of such extended period. (1st G. O., 1st June, 1854.)

The notice to be given for the cross-examination of such witnesses, and the time for their re-examination, are fixed by the 34th and 35th General Order, 7th August, 1852, (A), the former of which requires that a party desiring to cross-examine any such witness shall give forty-eight hours' notice to the party on whose behalf the affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, and in order that such party may, if he think fit, be present thereat.

By the latter order, it is required that the re-examination of any such witness shall immediately follow his cross-examination, and shall not be delayed to a future period.

The court may enlarge the time for closing the evidence as it may see fit. (15 & 16 Vict. c. 86, s. 38.) It may also require the production and oral examination in court on the

hearing of any cause of any witnesses or parties, and the costs of and attending the same are to be paid as the court shall direct. (15 & 16 Vict. c. 86, s. 39.) [But as to the exercise of the power given by this section, see "*The Hearing of the Cause*," &c.] When the examination of witnesses before any examiner shall have been concluded, the original depositions, signed by the examiner, are to be transmitted by him to the Record Office of the court, to be there filed, and any party to the suit may have a copy thereof, or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any General Order of the Lord Chancellor in that behalf. (15 & 16 Vict. c. 86, s. 34.) The examiner in whose handwriting the depositions were taken down having died without signing them, they being signed by the witnesses, the court ordered them to be received without the signature of the examiner. (*Bryson* v. *The Warwick and Birmingham Canal Company*, 20 L. T. 205.)

The payment to be made for these copies is fixed by the General Order of the 25th October, 1852, at fourpence per folio. Copies of depositions must be procured from the Record Office, instead of, as formerly, from the Examiner's Office; and it appears from the 34th section, that any party may take a copy of the depositions immediately after they are filed in the Record Office, which would be on the expiration of the time allowed for examining witnesses, that is to say, eight weeks after replication filed, or, if a witness has made an affidavit to be used at the hearing, then twelve weeks after replication filed, seeing that the opposite party is allowed four weeks for the cross-examination of any such witness. The periods here mentioned would in fact be what, according to the former practice, would be termed the times for passing publication, but would be subject to such extension as the court on application may think fit to direct. Although any party may take copies of the depositions, yet so far as the

hearing and purposes of the cause are concerned, a defendant requires only copies of his own witnesses' depositions, and those of the plaintiff, and would not be allowed, on taxation, for any copies beyond those, whilst the plaintiff requires copies of all the depositions taken in the cause.

No oath of messenger is necessary on transmitting depositions to the Record and Writ Office; and depositions taken abroad before the passing of the act were ordered to be received without oath of messenger, upon an affidavit of the plaintiff's solicitor that the documents were the identical documents transmitted to him, and had not been altered by him. (*Hind* v. *Selby*, 20 L. T. 256.)

It may be here repeated, that after the time fixed for closing the evidence, no further evidence of any kind shall be receivable without special leave of the court previously obtained. (15 & 16 Vict. c. 86, s. 38.)

Under special circumstances the court, under this section, allowed the plaintiff to produce at the hearing further evidence after the closing of the evidence, and after the cause had appeared in the daily paper for hearing, but all right of cross-examination was reserved to the defendant. (*Hope* v. *Threlfall*, 17 Jur. 1021.)

SETTING DOWN CAUSE.

To set down an original cause, obtain from the record and writ clerk a certificate on a 4*s.* stamp that it is in a fit state for hearing—indorse thereon the name or firm of the solicitor or solicitors setting it down, the party for whom acting, and the date, as follows: "A. B.," or "A. and B., plaintiff's solicitor" or "solicitors, 20th day of February, 1854"—take it with the judge's book to the proper division of the order of course seats, and the registrar's clerk there will then set down the cause. But a cause is sometimes set down before it is in a fit state for hearing, viz., before the time for closing evi-

dence has expired. This happens when the time for closing evidence is enlarged by judge's order at chambers, and in that case the order may provide for the setting down of the cause in the meantime; otherwise, when a replication has been filed, publication must pass before the cause can be set down. (*Ellis* v. *King*, 4 Madd. 126; *Langley* v. *Fisher*, 5 Beav. 588; 12 L. J. 72.) If the cause is set down upon bill and answer, it may be done immediately on the filing of the answer.

It may be set down as well out of term as in term. (82nd G. O., 1828, added to amended Orders of 23 November, 1831.)

By the 16th General Order, May, 1845, Art. 45, and the 114th Order, Art. 4, a plaintiff is bound within four weeks after publication is passed to set down his cause, and obtain and serve a subpœna to hear judgment, otherwise any defendant may move to dismiss the bill for want of prosecution. But where a defendant is not required to answer, and does not answer, such defendant can only apply to dismiss for want of prosecution at any time after the expiration of three months after appearance, and this he cannot do if a motion for a decree or decretal order has been set down, or the cause has been set down to be heard. (29 G. O., 7th August, 1852.)

A cause will be marked by the registrar's clerk as short, on production to him of one counsel's certificate that it is a proper case to be heard as a short cause, but this is done at the peril of the party at whose instance it is so marked; as f on the hearing it is considered a long cause, it will be remitted to the general list, and such party may be ordered to pay the costs of the day. A short cause should not occupy more than ten minutes. (—— v. ——, 17 Jur. 435.) The court will, under circumstances, dispense with the usual certificate of counsel. (*Hargraves* v. *White*, 22 L. J. 640; 17 Jur. 436.)

A defendant may set down the cause, and serve a subpœna to hear judgment, on the plaintiff's default, after four weeks from the passing of publication. (116th G. O., 1845.) The defendant serves the plaintiff only, and the plaintiff serves the other defendants. (*Smith* v. *Wells*, 6 Madd. 193.)

If, after the cause is set down, it becomes abated or compromised, the solicitor for the plaintiff is to certify the fact to the registrar, who is to cause an entry thereof to be made in his cause book; and the solicitor for the plaintiff is to be allowed the fee of 6*s.* 8*d.* for such certificate, if he shall certify the fact as soon as the same shall come to his knowledge. (39th G. O., April, 1828.)

On setting down the cause the registrar's clerk will give a note of the day on which the subpœna to hear judgment is to be made returnable.

SUBPŒNA TO HEAR JUDGMENT.

The subpœna to hear judgment is prepared by the solicitor and sealed by the record and writ clerk. It bears a Chancery stamp of 5*s.*; and a præcipe, together with the registrar's note, must be handed to the clerk at the time of sealing. The return is the day mentioned in that note, which is the record and writ clerk's authority for sealing the subpœna. It may be returnable as well out of term as in term. (82nd G. O., 1828, as extended by Orders of 23rd Nov. 1831.) But it cannot be at a less interval than one month from its teste. (16th G. O., May, 1845, Art. 46.) It should be issued on the same day on which the cause is set down. It must be served within four weeks after publication passes (16th G. O., May, 1845, Art. 45; and at least ten days before the return thereof. (Art. 46.) In other respects the preparation of the subpœna corresponds with the requirements for a subpœna ad test. Service upon the solicitor is good service. (26th G. O., May, 1845.) It need not be personal service, but the original writ must be produced to the persons to whom are delivered the copies, of which there

should be as many as there are defendants to be served. The following is the form of subpœna :—

Subpœna to hear Judgment.

VICTORIA, &c.

To greeting.

We command you [and every of you] that you appear before our Lord High Chancellor [*or*, before his lordship *or* honor the Master of the Rolls, *as the cause may be set down*] on the —— day of —— next, or whenever thereafter a certain cause now depending in our High Court of Chancery wherein A. B. [and others, *or* another, are *or*] is plaintiff [*or* plaintiffs], and C. D. [and others, *or* another, are *or*] is defendant [*or* defendants], shall come on for hearing, then and there to receive and abide by such judgment and decree as shall then or thereafter be made and pronounced, upon pain of judgment being pronounced against you by default.

Witness, &c. ROMILLY, M. R.

The following form of affidavit may be adopted :—

Affidavit of Service of Subpœna to hear Judgment.

In Chancery.

Between A. B. ..... Plaintiff;

and

C. D. ..... Defendant.

I, E. F., of ——, make oath and say as follows :—

I did on —— the —— day of —— serve Mr. ——, the solicitor for the defendant C. D. in this cause, with a writ of subpœna issuing out of and under the seal of this honourable court, by which said subpœna the said defendant was commanded to appear before [*state the substance of the subpœna in the past tense as far as* "default"] by delivering to and leaving with a clerk of the said Mr. —— [*or as may be*] at his office, situate at No. ——, Bedford Row in the county of Middlesex, a true copy of the said subpœna, and of the endorsement thereon, and at the same time showing to such clerk the said original subpœna so under seal as aforesaid.

Sworn, &c.

This affidavit, which must particularly refer to the endorsement required by the 3rd G. O., 1833 (*Rigg* v. *Wall*, 3 My. & Cr. 505), must be filed, and an office copy should be in court at the hearing.

COUNSEL'S BRIEFS FOR THE HEARING.

The briefs to counsel consist of the pleadings, the evi-

dence, and such observations as may be considered calculated to assist counsel on the hearing. The plaintiff includes in his brief all the answers of the defendants, and all the evidence taken in the cause. Each defendant has to do only with the bill—his own answer—his own evidence—and that of the plaintiff. If his answer is not replied to, his brief consists only of bill and answer, with any necessary observations. In addition to this either party is entitled to give copies of any documents necessary for use on the hearing, and to become the subject of argument. The copy bill is, of course, a printed one, the other particulars enumerated are briefed on brief paper. The depositions of each party should be distinguished from each other.

The plaintiffs appear all by the same counsel; and all defendants in the same interest, and appearing by the same solicitor, should be represented by the same counsel.

The 33rd G. O., 1828, gives the master a discretion to allow the costs of two counsel, although both are selected from the outer bar. Generally not more than two counsel should be engaged for the same party or set of parties, but there is no rule to this effect, the matter being left to the discretion of the taxing master (see *Wastell* v. *Leslie*, 13 L. J. 368; 8 Jur. 1001); who, however, will require a substantial reason to be assigned for incurring so great an expense.

Refresher fees are payable from one term to another, until the cause is heard; which should be avoided as much as possible by not delivering the brief to counsel until the cause is very near its hearing.

Consultations between the counsel are almost always allowed on taxation, even as between party and party, the masters being enabled to make the allowance by the 120th G. O. of May, 1845.

A printed copy of the bill should properly be furnished to the judge, at least two clear days before the hearing, but it may be handed in at any time before the cause is called on.

THE HEARING OF THE CAUSE AND THE DECREE THEREON.

The following incidents to the hearing of a cause are noticeable as forming important parts of the practice of the court under the present system:—

If the plaintiff does not appear at the hearing, the court will, on production of an affidavit of service of the subpœna to hear judgment, dismiss the bill with costs. An application to restore a cause to the paper, on the ground that the plaintiff had, seven months before, become bankrupt, and believed his rights had passed to his assignees, which was not the fact, was refused with costs. (*Frost* v. *Hilton*, 15 Beav. 432.)

If the defendant does not appear the court may, on similar evidence, make a decree in his absence.

In either case the decree or order is absolute, and equivalent to a decree made on hearing both sides, unless the court in the first-mentioned case otherwise orders (44 G. O., August, 1841, and 117th G. O., May, 1845), and in the latter case the defendant may plead the dismissal in bar to another suit for the same purpose. (117th G. O., May, 1845.)

All causes standing for hearing are entered in books kept for that purpose at the Registrar's Office in Chancery Lane, where the position in the list of any particular cause may be ascertained on an inspection, during office hours, without fee. A separate book is kept for each judge, except as to appeals, which are all entered in one book. The daily list of each of the judges is made out from these books.

All necessary papers and documents should be in court at the hearing.

Costs of the Day.]—The 34th General Order of April, 1828, provides, "That when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties or other defect on the part of the plaintiff, and is therefore struck out of the paper; if the same cause is

again set down the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit."

The 35th of the same Orders provides, "That where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the Lord High Chancellor, the Master of the Rolls, or the Vice-Chancellor, shall pay the sum of ten pounds, unless the court shall make other order to the contrary."

The 36th of the same Orders provides, "That whenever, upon the hearing of any cause or other matter, it shall appear that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award."

See *Moodie* v. *Bannister* (1 Eq. Rep. 180; 17 Jur. 520; 21 L. T. 148) as to defendant being allowed costs of the day where the objection of want of parties was taken by his answer and afterwards allowed; and *Furze* v. *Sharwood* (5 My. & Cr. 96), where the objection was not previously taken, but the costs were likewise given.

Affidavits.]—Under Sir George Turner's Act (13 & 14 Vict. c. 35), section 28, the court may, at the hearing of any cause, or of any further directions therein, notwithstanding any rule or practice of the court to the contrary, receive proof by affidavit of all proper parties being before the court, and of all such matters as are necessary to be proved, for enabling the court to order payment of any monies belonging to any married woman, and of all such other matters, not directly in issue in the cause, as in the opinion of the court may safely and properly be so proved.

Affidavits filed before issue joined are not receivable at

the hearing, unless within one month after issue joined notice in writing shall have been given by the party intending to use them to the opposite party of such intention. (33rd G. O., 7th August, 1852, (A).) Affidavits by particular witnesses, or as to particular facts or circumstances, may be used on the hearing by consent, or by leave of the court obtained upon notice, notwithstanding that the general evidence is elected to be taken orally, and such consent, with the approbation of the court, may be given by or on the part of married women or infants or other persons under disability. (15 & 16 Vict. c. 86, s. 36.) The execution of a deed may be proved on behalf of the plaintiff by affidavit at the hearing, if the answer has not been replied to and does not deny the execution. (*Chalk* v. *Raine*, 7 Hare, 393.)

Examination of Witness or Party in Court.]—The court may, on the hearing of any cause, if it shall see fit so to do, require the reproduction and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit, or in such manner, as it may think fit. (15 & 16 Vict. c. 86, s. 39.) Under this section the Vice-Chancellor Turner has decided in a case, where the court was asked to examine vivâ voce the defendant and a witness, both of whom had made affidavits, that the test by which to try whether the examination should be granted or not, was to see whether, if the case had come on upon bill and answer (a replication having been filed), the court would under the old practice have directed an issue; and that if it would not, the examination would not be ordered under this section. (*Wilkinson* v. *Stringer*, 16 Jur. 1033.) The power of the court was exercised by Vice-Chancellor Stuart with the sanction of the other judges, in *Smith* v. *Edwards*, 16 Jur. 1041. The parties have no right to such an examination at the hearing; and it is considered by Vice-Chancellor Stuart to be least of all desirable where the party sought to be examined is one

of the litigants, who has already had an opportunity of stating what he knew upon oath (*Oliver* v. *Wright*, 21 L. T. 164); and a motion by a plaintiff for leave to serve a defendant with a subpœna to appear at the hearing for the purpose of being examined, was refused with costs. (*May* v. *Biggenden*, 20 L. T. 189; 22 L. J. 429.)

Secondary Evidence.]—To enable a party to give secondary evidence of the contents of a document in the possession of the opposite party, he must serve him with notice to produce it, the depositions not being a sufficient notice. (*Stulz* v. *Stulz*, 5 Sim. 460.)

Legal Personal Representative.—If, in any suit or other proceeding before the court, it shall appear to the court that any deceased person who was interested in the matters in question has no legal personal representative, the court may either proceed in the absence of any person representing the estate of such deceased person, or appoint some person to represent it for all the purposes of the suit or other proceeding on such notice to such person or persons, if any, as the court shall think fit, either specially or generally by public advertisements; and the order so made by the court, and any orders consequent thereon, shall bind the estate of such deceased person in every respect, as if a duly constituted legal personal representative of such deceased person had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the court. (15 & 16 Vict. c. 86, s. 44.)

This section has been acted on in the case of *Ex parte Cramer, In re Stewart's Trusts* (20 L. T. 87), in which the court appointed a person to represent the estate; and in *Rogers* v. *Jones* (16 Jur. 968, and 20 L. T. 50), in which an order was made on an ex parte application, that the suit should proceed without a representative of a deceased executor, and that the proceedings in the Master's Office should go on as if such representative had been served with a writ of summons (the suit being by claim), and entered an ap-

pearance as a defendant; also in *Cox* v. *Taylor* (1 Eq. Rep. 122; 21 L. T. 123). The section has been held to apply to the appointment of representatives of estates of deceased persons, for the purposes of a special case set down for the opinion of the court (*Swallow* v. *Binns*, 20 L. T. 216), and to the case of a deceased defendant who was tenant for life of tithes (*Dean and Chapter of Ely* v. *Edwards*, 17 Jur. 219), and to those cases where the party interested is sought to be made liable (*Dean and Chapter of Ely* v. *Gayford*, 16 Beav. 561); but it was held not to apply to a case where the estate of a deceased person formed the subject of the suit (*Groves* v. *Lane*, 16 Jur. 1061; *Silver* v. *Stein*, 1 Drew. 295; *Bruiton* v. *Birch*, 1 Eq. Rep. 136; 21 L. T. 123; but see *Chaffers* v. *Headlam*, 20 L. T. 231; and *Magnay* v. *Davidson*, 9 Hare, App., 78—82; cases of insolvent estates); nor to a case where the administrator was out of the jurisdiction, though the fact was proved (*Donald* v. *Bather*, 16 Beav. 26); nor to the payment of money out of court. (*Rawlins* v. *M'Mahon*, 1 Drew. 225.)

In *Long* v. *Storie* (1 Kay, App., 12; 23 L. J. 200), the Vice-Chancellor Wood stated that the power was only intended to be exercised where there is a difficulty in obtaining representation, owing to the insolvency of the deceased, or some such cause. In the case just cited there was a foreclosure decree giving to seven persons, or any of them, a right to redeem within a certain time, before which time one died, and letters of administration were granted to a creditor; but before the proceeding was perfected, another creditor entered a caveat, and this court made an order, under the 44th section, appointing the first creditor to represent the estate of the deceased after a week's notice given to the opposing creditor, or, if the first creditor should refuse to be such representative, then upon evidence by affidavit of such refusal, appointing the other creditor to be such representative.

Where a contest as to a deceased defendant's testamentary papers prevented probate from being granted, the

court, on motion, appointed the executor named in the will to represent his estate in the cause. (*Hele* v. *Lord Bexley*, 15 Beav. 340.)

The person who would be appointed administrator ad litem is the most proper person to be nominated under this section to represent the deceased's estate. (*Dean and Chapter of Ely* v. *Gayford*, supra.)

The court will not dispense with a representative of a trustee, where there are necessarily active duties to perform in the execution of the trust. (*Fowler* v. *Bayldon*, 9 Hare, App., 78.)

Foreclosure.—For cases in which the court may direct a sale, or will give time to redeem the mortgaged premises, see infra, under this title.

Misjoinder of Plaintiffs.—Where there is a misjoinder of persons as plaintiffs, the court cannot dismiss the suit for that reason only; but if it appears to the court that, notwithstanding a conflict of interest in co-plaintiffs, or want of interest in some, or the existence of some ground of defence affecting some or one of them, they or some or one of them are or is entitled to relief, the court may grant such relief, and modify its decree according to the special circumstances of the case, and for that purpose direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, treat any one or more of the plaintiffs as a defendant or defendants in the suit, and the other plaintiff or plaintiffs as the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff without interest, the court may at the hearing order the cause to stand revived, as may appear just, and proceed to a decision of the cause, if it shall see fit, and give such directions as to costs or otherwise as may appear just and expedient. (15 & 16 Vict. c. 86, s. 49.)

Declarations of Right.—No suit is open to objection on

the ground that a mere declaratory decree or order is sought by it, and the court may make binding declarations of right, without granting consequential relief. (15 & 16 Vict. c. 86, s. 50.) See as to declaration of future rights, *Fletcher* v. *Rogers*, 20 L. T. 218. See also *Jackson* v. *Turnley*, 1 Drew. 617; 17 Jur. 643; 22 L. J. 949; and as to refusal of the court to declare the interests of parties who might be entitled in reversion, *Greenwood* v. *Sutherland*, 10 Hare, App., 12.

The meaning of the section is only to remove the objection that a plaintiff, who might have consequential relief, prays merely a declaration of his right; and it does not entitle a person to have a declaration as to a claim which may be made by another under circumstances which may or may not happen. (*Jackson* v. *Turnley*, supra.)

Partial Adjudication — Parties — Trusts — Accounts. — The court may adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that such property is comprised with other property in the same settlement, will or other instrument, without making the other parties interested parties to the suit, and without requiring the whole trusts and purposes of the settlement, will or other instrument to be executed under the direction of the court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property; but if the court shall think the application fraudulent or collusive, or ought not to be entertained, it may refuse to make the order prayed. (15 & 16 Vict. c. 86, s. 51.) This section applies only in those cases where there are, before the court, some of the parties interested in every point of view. (*Swallow* v. *Binns*, 20 L. T. 216.)

Accounts.—The court may also, in any case, give special directions as to the mode of taking and vouching accounts, as it may think fit, either by the decree or order directing

the accounts, or any subsequent order or orders, and may direct the original books containing the accounts, or any of them, to be taken as primâ facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. (15 & 16 Vict. c. 86, s. 54.) But it would seem the court will not make this order upon a reference to the master, made before the operation of the act. (*Lodge* v. *Prichard*, 20 L. T. 274.)

Sale of Real Estate. — Although the court may, as before, direct the sale of real estate, on the hearing, in a suit instituted in relation thereto, yet it need not wait till the hearing, but may direct the sale, either wholly or partially, at any time after the institution of the suit, with the same effect as if it were done by decree on the hearing of the cause; and any party to the suit in possession of the estate, or in receipt of the rents and profits, shall be compelled to deliver up possession or receipt to the purchaser, or such other person as the court shall direct. (15 & 16 Vict. c. 86, s. 55.) If liberally acted upon, it must be at once admitted that this is a very material clause in the act, for by it much time may be saved in the prosecution of a suit in which its provision can be brought into operation, particularly if the suit be commenced by bill. The proceedings for the sale of property are such as, considering the preliminary steps necessary to be taken, to occupy a great portion of the time consumed in the course of a suit in Chancery, and these are again added to by what is necessary to be done in order to complete the sale when effected. Therefore, to go to a hearing with the proceeds of the sale in court, instead of the estate itself, may be the means of enabling the court, in many cases, to make a final decree, thus at once shortening the duration of the suit, and by avoiding a second hearing on further directions, so commonly had, diminishing very considerably its expense. The

Master of the Rolls has put a construction upon the section (*Prince* v. *Cooper*, 20 L. T. 269), stating it to be intended to apply to cases where for the protection of the property, or for any other cause, it is necessary to come to the court for an order for a sale, but not to enable any party in a contested suit to obtain a decision of the questions in the cause before the hearing, and that the court will discourage any such attempt.

In a suit for the construction of a will of real estate and to execute the trusts thereof, the Vice-Chancellor Wood held, that the Court has power to direct a sale or mortgage of a sufficient part to raise the taxed costs of the suit, although some of the plaintiffs are infants; but the 55th section of the 15 & 16 Vict. c. 86, gives power to direct a sale before the hearing in those cases only in which the court could, under the old practice, have given such direction at the hearing. (*Mandeno* v. *Mandeno*, 1 Kay, App. ii.)

The court, will, however, make an order for sale to avoid the expense of a hearing on further directions. (*Gladwin* v. *Gladwin*, 21 L. T. 98.)

Allowance to Parties pendente Lite. — The court may in any proceedings before it relating to any real or personal property, on being satisfied that it will more than answer all claims to be provided for in the suit, and at any time after the commencement of such proceedings, allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or a part or the whole of the income thereof, up to such time as the court shall direct, and for that purpose to make such orders as may appear to the court necessary or expedient. (15 & 16 Vict. c. 86, s. 57.) This is a most beneficial enactment in favour of heirs at law, devisees, next of kin and legatees, and possibly it may be extended to other persons, as it does not in terms withhold its application from any person interested, in what way soever

that interest may be derived. It anticipates the hearing of the cause, and in many cases also the subsequent hearings for further directions, each of which is, according to circumstances, selected as the time of distribution. It would appear that the application may be made before the chief clerk, or, in case of difficulty, before the judge personally in chambers, and it should not perhaps be made in open court in the first instance. It is, however, within the author's experience, that such an order was obtained in open court on motion, with notice. When the court was unable, by reason of absence of parties, to decide on the right of the party claiming the interest of the residue under a will, it allowed her in the meanwhile to receive a portion of the income on her undertaking to refund if necessary. (*Moffat* v. *Burnie*, 16 Beav. 298.) In another case it was decided that an allowance can only be made upon an admission by the executors of assets. (*Knight* v. *Knight*, 16 Beav. 358.)

Mistake.—It may be generally stated here, though not confined to this head of proceeding, that if in any suit or proceeding, by the mistake of parties, the directions of the act 15 & 16 Vict. c. 86, fail to be followed, such mistake may be rectified by order of the court, if it shall think fit, as may be justified by the merits of the case, upon payment of such costs as the court shall direct. (15 & 16 Vict. c. 86, s. 60.) This section would appear more particularly to point to a special application for the purpose of rectifying the error, but this would not prevent the court from making such order as may be necessary for that purpose at the hearing, and incorporating it in the decree.

Vice-Chancellor — Jurisdiction. — The Vice-Chancellor appointed under the 53 Geo. 3, c. 24, is not the mere deputy of the Lord Chancellor, but has independent jurisdiction, subject to reversal or approval by the Lord Chancellor; and the personal interest of the Lord Chancellor in a decree made by the Vice-Chancellor will not vitiate the

decree of the Vice-Chancellor; and the signature of the Lord Chancellor being necessary for the purpose of inrolling the decree, personal interest is not an objection to its validity. (*Dimes* v. *The Grand Junction Canal Company*, 17 Jur. 73.) One Vice-Chancellor cannot, after decree, stay proceedings in the court of another Vice-Chancellor. (*Scotts* v. *Stone*, 17 Jur. 588; 22 L. J. 911.)

Cases for Opinion of Common Law Courts—Questions of Law—Legal Title or Right.—This court can no longer in any cause or matter direct a case to be stated for the opinion of any court of common law, but it may determine any questions of law in its judgment necessary to be decided previously to the decision of the equitable question at issue between the parties. (15 & 16 Vict. c. 86, s. 61.) It seems that the court will not determine a mere question of law, unnecessary to be decided previously to the question of equity, for the mere purpose of making a declaratory decree. (*The Trustees of the Birkenhead Docks* v. *The Birkenhead Dock Company*, 23 L. J. 457.) Again, it has been decided that the court will give no encouragement to any attempt to obtain its decision, on important questions of law before the hearing. (*Bates* v. *Brothers*, 2 Eq. Rep. 327.

In cases where this court, before the act, declined to grant equitable relief until the legal title or right of the party or parties seeking such relief was established at law, it may now determine such title or right without requiring the parties to proceed at law to establish it. (15 & 16 Vict. c. 86, s. 62.)

To enable this court to decide questions of law where there is difficulty, the practice is to procure the attendance of one of the common law judges. In such case the course is for the matter to be mentioned to the judge to whose court the cause is attached, who will communicate with the Lord Chancellor. His lordship will then make the necessary application, and inform the judge of the court below when it will be convenient for the common law judge to attend.

The chancery judge of the court below will then communicate the fact to the parties. Where a legal right is not clear and beyond all reasonable doubt, and there is a question as to amount of damage, this court will not decide the question of law, but give leave to bring an action. (*Vigurs* v. *Vigurs*, 16 Jur. 1009.) The assistance of the common law judges is provided for by the 14 & 15 Vict. c. 83, s. 8.

Form of Decree or Order.—By the 3 & 4 Will. 4, c. 94, s. 10, it is enacted, that any person shall be at liberty to take an office copy of so much only of any decree, order, report or exceptions as he may require; and that, unless the court shall otherwise specially direct, no recitals shall be introduced in any decree or order of the said court, but the pleadings, petition, notice, report, evidence, affidavits, exhibits, or other matters or documents on which such decrees and orders shall be founded shall merely be referred to; and it shall be lawful for the Lord Chancellor, if he shall think fit, together with the Master of the Rolls and Vice-Chancellor, or one of them, to make and issue such rules and regulations as to the form of such decrees and orders as he may deem necessary or proper for the proper drawing up of such decrees and orders, and carrying into effect the provisions of this act in regard thereto.

By the 27th General Order, December, 1833, it is provided, that each registrar shall attend in succession the three several courts of the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellor; and for the purpose of avoiding, as much as may be, expense and delay in the drawing of the decrees and orders of this court, it is thereby directed, that (except in orders for special injunctions, in which the usual recitals shall be inserted as theretofore), neither the bill nor answers, nor any part thereof, be stated or recited in the original decree or order; and that no part of the Master's report be stated in any decree upon further directions, except the Master's finding or

opinion upon the subject referred to him; and that in orders made upon petitions no part of the petition be stated or recited except the prayer; and that the same principle of brevity be observed in all the orders of this court made upon motion, so far as may be consistent with a statement explaining the grounds upon which the order is made. And for the better understanding of this order, certain forms of decrees and orders drawn pursuant thereto are subjoined. And it is thereby ordered that such forms shall be observed in all cases as nearly as may be, and that before any order made on a petition be passed, the original petition be filed with the clerk of the reports.

By the 12th General Order, April, 1842, it is provided, that every order or decree, requiring any party to do an act thereby ordered, shall state the time, or the time after service of the order or decree, within which the act is to be done; and that upon the copy of the order or decree which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words or to the effect following, viz.:—

If you, the within-named A. B., neglect to obey this order [*or* decree], by the time therein limited, you will be liable to be arrested under a writ of attachment, issued out of the High Court of Chancery, or by the Serjeant-at-Arms attending the same court; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order [*or* decree].

By the 45th General Order, August, 1841, it is provided, that every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the Master to inquire and state to the court what parts (if any) of such personal estate are outstanding, or undisposed of, unless the court shall otherwise direct.

By the 8th General Order, 16th October, 1852, it is provided, that each direction contained in every order directing any accounts or inquiries must be numbered, so that as far as may be each distinct account and inquiry may be desig-

nated by a number, and such order may be in the following form, with such variations as the circumstances of the case may require.

Form of Order directing Accounts and Inquiries.

This court doth order, that the following accounts and inquiries be taken and made; that is to say,

1. An account of the personal estate not specifically bequeathed, of A. B., deceased, the testator in the pleadings named, come to the hands of, &c.
2. An account of the said testator's debts.
3. An account of the said testator's funeral expenses.
4. An account of the said testator's legacies.
5. An inquiry what parts (if any) of the said testator's personal estate are outstanding or undisposed of.

And it is ordered, that the said testator's personal estate not specifically bequeathed, be applied in payment of his debts and funeral expenses in a course of administration, and then in payment of his legacies.

And it is ordered, that the following further accounts and inquiries be taken and made; that is to say,

6. An inquiry what real estate the said testator was seised of or entitled to at the date of his will and at the time of his death.
7. An inquiry what incumbrances affect the said testator's real estate.
8. An account of the rents and profits of the said testator's real estate received by, &c.
9. And it is ordered, that the said testator's real estate be sold.

And it is ordered, that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

So under Sir George Turner's Act (13 & 14 Vict. c. 35) the order is "that an account be taken," &c., instead of "that the master do take an account." (*In re Catling*, 16 Jur. 965; 20 L. T. 59.)

Where a plaintiff claiming as mortgagee frames his bill also as a general creditor's suit, the course is, that he should go in under the general decree for an account; and, if not satisfied under that, then go for the unsatisfied balance against his particular security; and the question who is to have the conduct of the proceedings will be decided in

chambers, as well when the proceedings are in two causes as where they are in one cause. (*Stone* v. *Van Heythuysen*, *Barton* v. *Van Heythuyson*, 18 Jur. 344.)

By the General Order of the 9th March, 1854, discharging that of the 31st January, 1853, which related to *legacy duty* only, it is provided that the registrar, in drawing up any decree or order whereby the accountant-general shall be directed to pay or transfer any fund or part of any fund in respect of which any duty shall be payable to the revenue under the acts relating to *legacy duty* or *succession duty*, shall, unless such decree or order expressly provides for the payment of the duty, direct the accountant-general to have regard to the circumstance that such duty is payable; and that where, by any decree or order, any carrying over to a separate account of any fund in respect of which any such duty may be chargeable shall be directed, the registrar shall add the words "subject to legacy duty" or "subject to succession duty," as the case may be, to the title of the account; and in order the better to provide security against the payment or transfer by the accountant-general of any fund chargeable with any such duty without the duty being first paid, the accountant-general, on receiving notice from the proper officer that the duty is payable, is to cause a memorandum to be made in his books in conformity with such notice; and the accountant-general, before executing any decree or order directing the payment or transfer of any fund or part of any fund in respect of which any such duty shall be payable, shall require the production of the official receipt for the duty, or a certificate from the proper officer of the payment of the duty chargeable in respect of any such fund, or any portion thereof respectively, by any such decree or order directed to be paid or transferred.

By the General Order of 12th April, 1853, it is rendered *unnecessary* for the registrar, in drawing up any decree or order, *to recite* any previous decree or order in the cause or matter, or any report, certificate, affidavit or other docu-

ment that has been (or before the decree or order is completed shall be) filed or recorded in the court; but it shall be sufficient to refer thereto, save only in matters of contempt or where the order varies from some general rule; and in such other cases as the court shall direct, or the registrar shall in his discretion see fit, the registrar shall make such short recitals as may be necessary to show the grounds on which the decree or order is granted.

As to the form of an order for payment out of court of cash standing to the credit of *a convict* to such person as her majesty should by sign manual appoint, see *Tompkins* v. *Lane*, 23 L. T. 9.

Infants.—By the 11 Geo. 4 & 1 Will. 4, c. 47, s. 11, it is provided, that where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel, such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years.

In other cases, where any act is required to be performed by an infant, as a conveyance or otherwise, he is to be served when of age with a subpœna to show cause against

the decree, and is allowed six months within which to show cause.

Interest.—By the 1 & 2 Vict. c. 110, s. 17, it is provided, that every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

Effect of Decrees.—By the 18th section of the same act it is provided, that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers by that act given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies by that act given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid.

Decree to establish Will.—A decree to establish and execute the trusts of a will will not make valid those trusts which, upon the subsequent construction of that will, should be held to be invalid. (*Gooch* v. *Gooch*, 21 L. T. 249.)

Production of Documents in Court.—The court will order the registrar of the Consistory Court to attend with the will in court at the hearing. (*Wigan* v. *Rowland*, 17 Jur. 816.) A defendant is bound to produce a document at the hearing, without being served with any order, if the plaintiff has proved it to be in his possession. (*Wheat* v. *Graham*, 7 Sim. 61.)

Prospective Order.—The court will not make a prospective order to meet a contingency that may never occur. (*Campbell* v. *Campbell*, 21 L. T. 164.)

Pleading or demurring orally.—In a suit by bill, a defendant not answering, nor filing any affidavit in answer, cannot demur, or plead the Statute of Limitations orally at the hearing. (*Holding* v. *Barton*, 22 L. T. 81.)

Dismissal of Bill.—The dismissal of a bill does not prejudice the right to file another for the same purpose under a different state of circumstances. *Mayor, &c. of Liverpool* v. *Chorley Waterworks Company*, 2 De G., M. & G. 852.)

Clerical Errors.—Clerical errors in decrees or decretal orders, or errors arising from accidental slip or omission, may, before enrolment, be rectified, on petition, without a rehearing. (45th G. O., 1828.)

MINUTES OF DECREE.

When the decree is pronounced, the necessary papers are to be left with the registrar of the day at his seat in the Registrar's Office, and he will then prepare minutes to be handed out to the several solicitors in the cause, who afterwards meet to settle them before the decree is transcribed. If any difficulty arises, an appointment must be given for a day when the registrar is in attendance, and he will decide the points in dispute; but if either party is dissatisfied with his decision, it is competent to him to give a notice of motion to vary the minutes, or to have the cause put in the paper to be spoken to. Minutes once settled by the registrar

cannot be altered in the absence of any party interested. (*Major* v. *Major*, 13 Jur. 1.)

Registrars' Directions as to what Documents and Papers should be left on bespeaking Minutes, Decrees and Orders in the Registrars' Office.

MINUTES OF DECREES.—Counsel's brief of the pleadings and the correct title of the cause, the names of the several defendants being corrected from their answers and the names of the guardians of any infants inserted.

If a Memorandum of service of Copy Bill on any of the Defendants has been entered.—The order to enter the memorandum, with the record and writ clerk's certificate of the entry thereof and of no appearance by the same defendants.

If a traversing note has been filed and the Defendant does not appear at the Hearing.—The record and writ clerk's certificate that the note has been filed, an affidavit of service of a copy of the note and of subpœna to hear judgment.

If the Bill has been taken pro confesso.—The order for the record and writ clerk to attend at the hearing with the record of the bill and all previous orders as to the contempt.

If any exhibits proved in the Cause are to be entered as read.—A list and correct description of each in the following form:—

"An exhibit marked *A*, being the indenture dated in the pleadings mentioned.

"An exhibit marked *B*, being a letter dated and addressed by the plaintiff to the defendant.

"An exhibit marked *C*, being an extract from the register of baptisms for the parish of so far as relates to the baptism of *A. B.*, &c., &c., &c."

If any Admissions are to be entered as read.—The original paper of admissions signed by the parties or their solicitors must be produced to be endorsed by the registrar and must be filed in the Report Office, before the order is left to be passed.

If any Documents have been proved at the hearing vivâ voce or by affidavit.—The order authorizing them to be so proved, with the office copies of the affidavits (if any) and the documents proved.

MINUTES OF ORDERS ON FURTHER DIRECTIONS OR FURTHER CONSIDERATION.—Counsel's brief, the original decree and supplemental decrees (if any), or the order on further directions or further consideration, reserving the further directions or adjourning the further consideration on which the cause is heard, and any subsequent orders to revive; the office copy of the master's report or chief

clerk's certificate, and, in the case of a master's report, the order confirming the same absolutely.

If a Memorandum of service of Copy Bill has been entered.—A certificate of no appearance having been entered.

If the Order on Further Directions or Further Consideration deals with any Purchase money.—Consent briefs for the purchaser, or affidavits of notice of the intended application of the purchase money, and that the conveyance to the purchaser has been duly executed.

MINUTES AND ORDERS ON MOTION.—Counsel's brief, with his endorsement of the order made; the notice of motion (if any) annexed, and office copies of the affidavits and the other evidence used on the hearing of the motion.

MINUTES AND ORDERS ON PETITION.—The original petition and counsel's brief, with his endorsement of the order made, any evidence used on the hearing, and any decree, order, or office copy report or certificate on which the petition is founded.

MINUTES AND ORDERS FOR PAYMENT OF PURCHASE MONEY INTO COURT.—The office copy report or certificate of purchase, and if a master's report, the order confirming the same absolute, and the conditions of sale.

If any Deposit shall have been paid.—The order or authority directing the deposit to be taken, the affidavit showing the amount thereof on each lot, and the accountant general's certificate of the payment of the deposit into court.

MINUTES AND ORDERS UNDER ACTS AUTHORIZING PUBLIC WORKS.

Where the Order deals with any money paid into Court by the promoters of any Public Undertaking to the credit of such Undertaking not standing to any separate Account.—The accountant general's certificate of the payment into court of the sum sought to be dealt with, and also the accountant general's certificate of the fund in court to the credit of the undertaking; and, when the order directs the carrying over the money to a separate account, or payment of the same out of court to any person absolutely entitled thereto, also an affidavit of the petitioner verifying the petition, and of no adverse interest or claim.

MINUTES AND ORDERS VACATING RECEIVERS' RECOGNIZANCES.—An office copy of the receiver's recognizances from the office of the clerk of enrolments.

ORDER ABSOLUTE UNDER WINDING-UP ACTS.—The affidavit of the service of the petition, and the London Gazette and newspapers containing the advertisement thereof.

ORDER ON APPEAL FROM MASTER'S DECISION UNDER WINDING-UP ACTS.—The master's certificate of his decision.

MINUTES OF DECREES AND ORDERS DEALING WITH ANY FUND IN COURT.

Whenever any fund in Court is to be dealt with.—The accountant general's certificate, and if the funds are restrained by any order, the restraining order, or an office copy thereof.

Where payment out of Court is ordered to Executor or Administrator.—The probate or letters of administration.

IN ALL CASES OF NON-APPEARANCE of any party or person served at the hearing of any cause, matter, petition or motion.—An affidavit of service on the party or person not appearing.

GENERALLY any documents or evidence required to be produced to the court should be left with the registrar on bespeaking the minutes of the decree or order.

N.B.—Solicitors and their clerks, on applying respecting minutes or orders, are requested to state by which judge and on what day the order was pronounced, and where the order is made on any ex parte matter, the title thereof as the same appeared in the court paper.

When the minutes are settled, they are left, together with the other papers, with the registrar's clerk, at his seat, for the decree to be drawn up, which will be done accordingly in the course of two or three days. The registrars have also issued the following regulations respecting the drawing up of orders (which extends also to decrees) and the bespeaking of office copies.

STAMPS FOR ORDERS AND OFFICE COPIES OF ORDERS.

1. The amount of the stamp will be marked by the registrar's clerk on the minutes.

2. The registrar's stationer will supply the stamp when the order is copied, and will return the papers to the registrar's seat, but retain the order.

3. When the solicitor applies at the registrar's seat for the order, his papers will be delivered to him, and he will be referred to the registrar's stationer, from whom he will receive the order, on paying for the stamp.

4. *Orders of Course printed Forms.*—Where printed forms are used, the registrar's clerk will tell the solicitor what

form is required, and the solicitor will obtain the stamped form from the registrar's stationer, and leave it with his papers.

N.B. Unless the order is taken away, and the stamp paid for within three weeks from the day on which the order is bespoken, it will be cancelled, and the stamp recovered as spoiled; and in case the solicitor shall want the order recopied, he will be required to pay the stationer's charge for recopying.

Office Copies.—The stamps will be paid for to the stationer on bespeaking.

Orders dated prior to Michaelmas Term, 1852.—The registrar's stationer will get stamps affixed on orders requiring the same, which shall have been marked with the proper amount of stamp by the registrar's clerk, thus: stamp, 2*l.*—and left with the registrar's stationer with the money.

PASSING DECREE.

Every decree or order must be passed, and then entered, before it is of any force. It is passed by the registrar signing his initials in the margin at the end, after carefully perusing it and satisfying himself of its correctness. For this purpose an appointment must be given to the opposite solicitors, with a request for them to bring their briefs, as at that time the registrar enters them in his book. He will now also correct any errors that may have escaped him at the earlier stages. It is usual to leave the decree and briefs and other papers with the registrar's clerk, for the decree to be passed in the absence of all parties, unless it is desired to call the registrar's attention to any point, in which case it should be done in the presence of all parties.

ENTERING DECREE.

The decree is left to be entered at the entering seat in the registrar's office. This cannot be done six years after it is passed without an order authorizing it (*Tolson* v. *Jervis*, 8

Beav. 364, which also decides that all proceedings taken before entry are irregular and voidable.) It should be done within a reasonable time, otherwise an order to enter it nunc pro tunc is necessary. The 30th General Order, December, 1853, directs the entry of decrees under the direction of the master of reports and entries. The time usually taken for entering a decree or order is two days, but if urgent it will be done so as to be delivered out on the following day.

CORRECTIONS IN DECREE.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before enrolment be corrected, upon petition, without the form and expense of a rehearing. (45th G. O., April, 1828.)

Where there were errors apparent on a decree, they were on motion allowed to be rectified after enrolment. (*Weston* v. *Haggerston*, Coop. 134.) An error in an order was rectified after the lapse of twenty-four years, though the records had been deposited in the Tower. (*Ex parte the Justices of Essex*, 22 L. J., 328.)

REGISTERING DECREE.

A decree of this court may be registered as a common law judgment may, under the acts 1 & 2 Vict. c. 110, ss. 18, 19; 2 Vict. c. 11; and 3 & 4 Vict. c. 82.

SERVICE OF NOTICE OF DECREE, OR ORDER HAVING THE EFFECT OF A DECREE, AND ITS EFFECT.

In certain administration suits and other cases it is necessary to serve notice of the decree on interested persons not parties to the suit. Observations on this subject, applicable either to a decree upon bill, or an order upon claim, or summons having the effect of a decree, will be found infra.

II. Proceedings for Defendants to Bill.

The subpœna to appear to and answer a bill being abolished (15 & 16 Vict. c. 86, s. 2), the first notice which a defendant now has of a bill being filed against him, unless the bill were filed before the operation of the act, will be the service upon him of a copy of the bill, either printed or written, according to the nature and urgency of the case. Except, however, in the cases specially provided for by the 6th section of the act (15 & 16 Vict. c. 86), the copy served, as also the bill filed, must be printed.

The copy must bear the indorsement mentioned in the schedule to the act, and in the 3rd section, and must be previously stamped by the record and writ clerk with a stamp indicating the filing of the original bill, and the date of such filing. (15 & 16 Vict. c. 86, s. 3.) Otherwise the defendant may treat it as a nullity. The defendant must enter by himself or his solicitor an

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to the bill, of which he is served with a copy indorsed and stamped, as before mentioned, within eight days after such service; for by the 4th section the effect of the service of the copy bill is stated to be the same as that of the service of a subpœna would have been before the operation of the act, and the plaintiff being under that section entitled to all the remedies for default of appearance and otherwise he would have been entitled to before such operation, in case of due and proper service of a subpœna to appear to and answer a bill, the defendant will after that time be in contempt if he do not appear, provided he was served within the jurisdiction of the court. We are now of course dealing with the case of a defendant required to appear and defend the suit, and not with that of a defendant who has been served with the

copy of the bill under the 23rd to the 29th inclusive of the General Orders of the 26th August, 1841, and the 28th of the General Orders of the 8th May, 1845, the practice relating to which remains unaltered, and will be found to be governed by those orders.

In the case under consideration, the indorsement on the copy served will indicate the time within which the appearance is to be entered, and which time, when the defendant is served out of the jurisdiction of the court, will vary according to circumstances and the order of the court directing such service.

But as to service of a copy bill out of the jurisdiction, and the consequent appearance of the defendant, see the observations thereon under the title of "*Proceedings for Plaintiffs by Bill.*"

Where the indorsement is omitted, it may be assumed that the defendant is not required to appear to and answer the bill, but is merely served with a copy, in order that, under the General Orders above mentioned, he may be bound by all the proceedings in the cause.

It will be seen, by reference to those orders (which however are now seldom acted under), that, if a defendant desires to do so, he may enter either an ordinary or a special appearance, although not required to do so by the plaintiff, and may have the suit prosecuted against him, and be let in to defend it in the usual way. In doing this, however, he must consider the risk he runs of having to pay some of the costs of the suit, viz., such of them as may be given rise to by such proceeding. But if it be desired to enter either a common or special appearance under the 26th or 27th of the Orders of the 26th of August, 1841, it must be borne in mind that by the 37th Order of the 8th May, 1845, no party can do so after the expiration of twelve days from the service of the copy of the bill, without first obtaining an order of the court for that purpose on notice to the

plaintiff, to be granted, if the court thinks fit, upon such terms as are just; and that in that case any such party will be bound by all the proceedings in the cause prior to such appearance being entered, unless the court otherwise directs. When an appearance is entered by a plaintiff for a defendant, the latter may, under the 36th of the same Orders of 1845, notwithstanding such appearance, enter an appearance for himself in the ordinary way; but such appearance by the defendant will not affect any proceeding duly taken, or any right acquired by the plaintiff under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance, which he is entitled to in any event of the suit, as against the defendant, under the 35th of the same Orders.

The appearance of a defendant to an *amended bill* is subject to the same rules as his appearance to an original bill, he being allowed the same time after service of a copy of the amended bill, as in the case of an original bill, and the time runs from such service.

The appearance of a defendant to a *supplemental bill* will also date from the service of the copy bill; but what is the practice in this particular upon a statement of new facts or circumstances under the 15 & 16 Vict. c. 86, s. 53, and the 44th of the General Orders, 7th August, 1852 (A), is at present a matter of doubt.

We are told in a vague manner what to do with regard to answering, and as to evidence "and otherwise," for the order states such proceedings are to be had and taken upon the statement so filed, as if the same were embodied in a supplemental bill, but nothing is said about appearance. Now if it were embodied in a supplemental bill, a copy would be served on the defendant, and he must appear in due time.

If, therefore, the meaning of the order be that a copy of the statement is to be served on the defendant, as a copy of a supplemental bill would be, and that appearance is intended

to be included in the words "or otherwise," then the defendant should appear within eight days from such service; but it is to be regretted that this is not stated. On the other hand, if it be intended that the defendant should not appear at all, it is difficult to collect that intention from words which direct us to do what we should have done under another form of proceeding, which clearly would require an appearance to be entered.

A person served with a *supplemental order*, or an *order to revive*, obtained under the 52nd section of the act 15 & 16 Vict. c. 86, must enter an appearance within the usual time. (See however "*Revival of Suit*," ante.)

Appearances are entered at the Record and Writ Clerks' Office, Chancery Lane, upon a præcipe being handed to the clerk, a form of which may be obtained of the stationer in the office, impressed with the proper fee stamp, which is seven shillings where the number of defendants does not exceed three, and an additional seven shillings for any additional number, not exceeding three.

GUARDIAN AD LITEM AT DEFENDANT'S INSTANCE.

When a defendant is an infant or a person of unsound mind, a guardian ad litem must be appointed. An appearance may be entered for an infant without a guardian, but no further proceedings can be taken until one is appointed.

Guardians ad litem are still appointed in the mode pointed out by the Orders of the 26th October, 1842, when the appointment takes place in open court.

By the 27th of those Orders it is provided, that, for the purpose of procuring a guardian ad litem to be assigned in court for an infant defendant, the solicitor is to attend the court with the infant and proposed guardian, and request such assignment to be made; and he is to certify to the court that the proposed guardian has no interest adverse to the interest of the infant, and is a proper person to be assigned guardian.

By the 28th of the same Orders it is provided, that where, according to the present practice, it has been usual to assign a six clerk guardian ad litem of an infant or person of unsound mind, the court may appoint one of the solicitors of the court to be such guardian, and may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties or some one or more of the parties to the suit in which such appointment shall be made, or out of any fund in court, in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require.

The necessary certificate and request when prepared (they may be obtained at the stationer's) are handed to the registrar, the infant being present in court. The registrar hands them to the judge, who returns them, and the registrar marks them and returns them to the solicitor, who then draws up the order.

When the appointment is to be made twenty miles or upwards from London, a commission used to issue upon an order of course; but it seems that now in that case, whenever for a sufficient reason the parties cannot attend in court, the appointment may be made by order of course, granted on a petition of course at the Rolls, supported by an affidavit by the solicitor, of which the office copy must be produced of the fitness of the proposed guardian, and that he has no interest adverse to the interest of the infant; a commission, therefore, is no longer necessary. This order may also be obtained on motion, ex parte, in open court, as it was obtained in the case of *Peascod* v. *Tully*, 15 Jur. 663. A similar order was made in a case of *Bourne* v. *Hassell*, before the Vice-Chancellor Knight Bruce. And see *Bennison* v. *Worsley*, 17 Jur. 2. Also in *Egremont* v. *Egremont*, 20 L. T. 122, and 22 L. J. 108, the Court of Appeal

appointed a guardian ad litem for an infant defendant within the jurisdiction, on the application of the plaintiff, without a commission, on production of an affidavit of the fitness of the proposed guardian. It has been held in an anonymous case, that a party to the cause, not having an adverse interest to that of an infant defendant, is a more proper person than a solicitor or stranger to be appointed guardian ad litem. (22 L. J. 288.) The Vice-Chancellor Wood requires the guardian to have some interest in the infant; that there should be relationship between them, or something of that sort. (*Foster* v. *Cautley*, 17 Jur. 370.)

By the 6th General Order, 1st June, 1854, it is provided, that guardians ad litem appointed for infants, or persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, are to be appointed in like manner as guardians ad litem to answer and defend are now appointed in suits on bills filed.

By the 7th ibid. it is provided, that at any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian ad litem to be appointed for any infant, or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order.

Before the court will appoint a guardian ad litem to a person of unsound mind not so found by inquisition, it will require an affidavit of a medical man in addition to that of a member of the defendant's family, or of some person who has known him for some time, as to state of health, &c. (*Simmons* v. *Bates*, 20 L. T. 272.) The court appointed a guardian ad litem to a person of unsound mind, not found so by inquisition, to appear upon summons at chambers. (*Re Osbaldiston*, 20 L. T. 322.)

Where a defendant is a person of unsound mind, and his relations decline to act as guardians, the solicitor to the Suitors' Fee Fund will, on an application on behalf of the

defendant, be appointed his guardian ad litem. (*Palmer* v. *Longland*, 21 L. T. 180.)

The application for a guardian to an infant defendant of unsound mind should be to the court, and not to the jurisdiction in lunacy. (*Pidcock* v. *Boultbee*, 2 De G., M. & G. 898; 22 L. J. 611.)

The court would not appoint as guardian ad litem the solicitor of a trustee defendant, who from age and infirmity was incapable of transacting business. (*Patrick* v. *Andrews*, 22 L. J. 240.)

Where an infant defendant was out of the jurisdiction until after a decree was made in the cause directing accounts, which were being taken when he came within the jurisdiction, the proper course was held to be for the infant on motion to obtain an order appointing a guardian, and by a separate order to obtain a reference to inquire whether it was for the infant's benefit to adopt the proceedings; and, if so, then that he do adopt them and attend the future proceedings. (*Copley* v. *Smithson*, 5 De G. & S. 583.)

PLEA, ANSWER, DISCLAIMER AND DEMURRER.

When the plaintiff requires an answer from the defendant, which will be known by his filing and serving the defendant or his solicitor with a copy of the interrogatories which now are not contained in the bill originally filed, the defendant must plead, answer or demur, not demurring alone, within fourteen days from the delivery to him or his solicitor of a copy of the interrogatories he is required to answer, or obtain further time for that purpose; and when an answer is not required from a defendant, he may, if he desires it, plead, answer or demur without leave within twelve days after appearance, but not afterwards, unless further time be granted by the court. (15 & 16 Vict. c. 86, s. 13; 19th General Orders, 7th August, 1852 (A).) The power of the court to grant further time to plead, answer

or demur, whether the defendant be required to answer or not, is entirely unaffected by the new acts and orders. (15 & 16 Vict. c. 86, s. 13.) In either case, whether required to answer or not, a defendant has only, as a matter of course, twelve days after appearance to demur alone to a bill (Ibid. and 16 G. O. May, 1845, Art. 10.)

An infant pleads, answers or demurs only by guardian. A married woman, desiring to demur alone, must obtain an order for that purpose (*Barron* v. *Grillard*, 3 V. & B. 165), which is granted of course; and if sued as a feme sole, and wishes to plead coverture, she must obtain an order to put in that plea, without joining her husband. (*Higginson* v. *Wilson*, 17 L. T. 22; 11 Jur. 1071.)

A defendant may demur alone to a bill amended after plea put in (*Robertson* v. *Lord Londonderry*, 5 Sim 226), and notwithstanding an order to amend has been obtained but not served (*Price* v. *Webb*, 2 Hare, 515; 13 L. J. 50); but not to a bill amended after issue joined and leave given to add parties, he having been previously served with a copy of the original bill, omitting the interrogatories, and omitted to enter an appearance thereto (*Powell* v. *Cockerell*, 4 Hare, 565; 15 L. J. 196; 10 Jur. 243); nor after an attachment for want of answer (*Mellor* v. *Hall*, 2 S. & S. 321); nor can he answer and demur after such attachment (*Curzon* v. *De la Zouch*, 1 Swan. 193; *Att.-Gen.* v. *Shield*, 18 L. J. 176; 13 Jur. 330), though the demurrer be to a part of the discovery sought, and not to the relief. (*Vigers* v. *Lord Audley*, 2 M. & C. 49.)

The court will not determine upon demurrer a legal question upon which there is any doubt. (*Evans* v. *Evans*, 18 Jur. 666.)

The 36th General Order, August, 1841, provides, that no demurrer or plea shall be held bad and overruled upon argument only because such demurrer shall not cover so much of the bill as it might by law have extended to. But this does not apply to a case where there is something in the bill of a

specific and particular nature not covered by the demurrer. (*Dell* v. *Hale*, 2 Y. & C. 1.)

The 37th of the same Orders provides, that no demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer.

The 38th ibid. declares, that a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer, and that he shall be at liberty so to decline notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer. A defendant cannot decline to answer merely on the ground that the bill is open to a general demurrer. (*Mason* v. *Wakeman*, 2 Phil. 516; 17 L. J. 208.) This Order applies to cases where the demurrer must have been a demurrer to the relief, as it would to cases where it would have been to the discovery (*Tipping* v. *Clarke*, 2 Hare, 383); also when the bill is demurrable only for want of parties or for want of equity (*Kaye* v. *Wall*, 4 Hare, 127, 283; 9 Jur. 128, 684); and it applies to a case where the bill is generally demurrable, and the defendant may have the benefit of the order, although the time for demurring has expired. (*Drake* v. *Drake*, 2 Hare, 647; 8 Jur. 642.)

After a plea or demurrer submitted to and the bill afterwards amended, the same time must be considered as allowed for demurring, whether an answer is required or not, as is allowed in the case of an original bill, although not specifically noticed in the act or orders; but upon a plea or demurrer being overruled on argument, the defendant must obtain further time from the court to put in his answer. If the defendant should demur or plead to the bill, either wholly or partly, and the plaintiff does not set down the demurrer or plea for argument within the times limited in such cases respectively by the 17th and 18th articles of the 16th of the

General Orders of 8th May, 1845, he will be held to have submitted thereto, as would also have been the case before the new system [see further as to pleas and demurrers, under title "*Proceedings for Plaintiffs by Bill*"]; and if the plaintiff does so set down such demurrer or plea, the defendant will prepare for the argument before the court as he would have done under the recent practice, except that he will deliver to his counsel and the court printed copies of the bill instead of written copies. When a demurrer or plea is not set down for argument, the order for the plaintiff to pay the defendant's costs, under the 46th of the General Orders of May, 1845, is an order of course and need not be mentioned to the court, the motion paper being handed to the registrar. No suit is open to objection, on the ground that a mere declaratory decree or order is sought thereby, as the court may make binding declarations of right without granting consequential relief. (15 & 16 Vict. c. 86, s. 50.)

A plea that the defendant at the time of the filing of the bill did not sustain the character of administrator imputed to him by the bill, was held bad and overruled, with costs, as it would be sufficient if he bore that character at the time of the hearing. (*Horner* v. *Horner*, 22 L. T. 115; 23 L. J. 10.)

Two inconsistent facts cannot be joined in one plea (*Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404); nor a variety of facts in one plea unless all be reduced to one defence (*Ritchie* v. *Aylwin*, 15 Ves. 82); but leave will be given, under special circumstances, to file a double plea. (*Kay* v. *Marshall*, 1 Keen, 190; *Gibson* v. *Whitbread*, 4 Madd. 241; *Bampton* v. *Birchall*, 4 Beav. 558.)

The defence of the Statute of Frauds may be set up by demurrer as well as by plea. (*Wood* v. *Midgley*, 23 L. T. 69.)

A plea must be supported by an answer answering statements or allegations in the bill, which, if answered, may disprove or be evidence to disprove the plea. (*Hunt* v.

Penrice, 22 L. T. 140; and see also *Jones* v. *Davis*, 16 Ves. 262.)

A plea will lie to a misdescription of the plaintiff in the introduction to the bill. (*Smith* v. *Smith*, 1 Kay, App., 22.) It must be precise in its averments. (Ibid.)

A defendant not pleading or demurring, but answering the original bill, cannot, after amendment, plead to the amended bill, unless the case is altered by the amendment, or some material fact has since come to his knowledge. (*Esdaile* v. *Molyneux*, 10 Jur. 852.) A plea may be good in part and bad in part. (*Mayor of London* v. *Levy*, 8 Ves. 403.)

If a defendant obtains further time to answer, he may file a plea, unless restricted by the order. (*Hunter* v. *Nockolds*, 2 Phil. 540; 17 L. J. 253; 12 Jur. 149.) But in the more recent case of *Newman* v. *White*, 16 Beav. 4, the Master of the Rolls decided the contrary.

In a suit by bill, a defendant not answering nor filing any affidavit in answer cannot demur or plead the Statute of Limitations orally at the hearing. (*Holding* v. *Barton*, 22 L. T. 81.)

The court refused to allow a demurrer to be set down for argument after the time limited. (*Knight* v. *Marjoribanks*, 14 Sim. 198; See also *Matthews* v. *Chichester*, 16 L. J. 160; 11 Jur. 49.)

The allowance of a general demurrer dissolves an injunction, though the court give leave to amend the bill. (*Schneider* v. *Lizardi*, 9 Beav. 461; 15 L. J. 435.)

On a demurrer overruled, defendant cannot again demur (*Bancroft* v. *Wardour*, 2 Bro. C. C. 66), nor plead (*Rowley* v. *Eccles*, 1 S. & S. 511); but he may demur to the bill if afterwards amended (*Bosanquet* v. *Marsham*, 4 Sim. 573); and may appeal from the decision of the court below upon the original demurrer. (*Jackson* v. *North Wales Railway Company*, 13 Jur. 69.)

A plea, like a demurrer, is engrossed on parchment and

filed by the record and writ clerk. They must each be signed by counsel and endorsed with the name and address of the solicitor or party filing them. A demurrer is not sworn to or signed by the defendant; but with regard to pleas, some are put in on oath and others not: the latter are mostly pleas to the jurisdiction or pleas of disability, or of matters on record. The oath or signature, or both, to an answer or plea may be dispensed with by the plaintiff, if he thinks fit, and for that purpose a petition of course is presented at the Rolls.

The defendant's signature is required to a plea when it is to be put in on oath; and it appears that when a plea which ought to have been put in on oath is filed without oath, a subsequent step in the cause is not a waiver of the irregularity, but that it may be taken off the file even after it is set down. (*Wall* v. *Stubbs*, 2 V. & B. 354.)

A demurrer, or plea need not be entered with the registrar; but upon the filing thereof by a defendant, either party may set it down for argument immediately. (44th G. O., 8th May, 1845.)

The judge must be furnished with a printed copy of the bill and a copy of the plea or demurrer, for use on the hearing; and the briefs for counsel will consist of the same papers, with the addition, if thought necessary, of any pertinent observations the solicitor can offer for counsel's assistance.

It depends on the nature of the case whether the court will give costs of a demurrer on argument or leave to amend, the court having a discretion to exercise (*Schneider* v. *Lizardi*, supra); and sometimes it will reserve the question to be decided on the demurrer till the hearing of the cause. (*Kirwan* v. *Daniel*, 5 Hare, 493; 16 L. J. 191; 11 Jur. 235.)

A plea or demurrer is set down in the same way as a cause for further directions, viz., by petition, which must state whether the information or bill is marked with the words "Lord Chancellor" or "Master of the Rolls"

(5th G. O., May, 1837,) and also the time of filing the plea or demurrer, and whether the demurrer is to the whole, or to part only, of the bill.

The General Order, 23rd February, 1850, provides, that all causes for further directions, or on equity reserved after a trial at law shall have been had, or the certificate of a court of law shall have been obtained, in pursuance of a decree or order pronounced by the Lord Chancellor, or one of the Vice-Chancellors, and all pleas, demurrers, exceptions, and objections for want of parties, required to be heard before the Lord Chancellor, or one of the Vice-Chancellors, shall be set down by the registrars for hearing, on orders drawn up by them upon petition to the Lord Chancellor, left with the registrar, without any fiat or direction from the Lord Chancellor. The following is the form of petition :—

Petition to set down Plea or Demurrer.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. and E. F. ..... Defendants.

To the Right Honourable "The Lord High Chancellor of Great Britain" [*or* "Master of the Rolls"],

The humble petition of the plaintiff

Showeth,

That your petitioner on the —— day of ——, filed his bill of complaint in this honourable court against the above-named defendants, which was duly marked with the words "Lord Chancellor—Vice-Chancellor ——" [*or*, "Master of the Rolls"].

That the defendant C. D., on the —— day of ——, filed his plea [*or* demurrer] to the whole [*or* to part] of the said bill, and your petitioner is desirous that the same shall be set down for argument.

Your petitioner therefore humbly prays your lordship [*or* your honour] may be set down to be argued before his Honour the Vice-Chancellor —— [*or*, before your Honour] next after the pleas and demurrers already appointed for hearing.

And your petitioner shall ever pray, &c.

The petition is addressed to the Lord Chancellor or to the Master of the Rolls, as the case may be, according to the marking of the bill in the cause; and if presented at the Rolls, it bears a 7*s.* chancery stamp, but not otherwise. The order, when obtained, must be served on the plaintiff's solicitor two clear days at least before the hearing.

Except upon a plea or demurrer overruled on argument to obtain further time to plead, answer or demur, application must be made to the judge at chambers, and of course to the judge to whose court the cause is attached, unless it be during vacation, when one judge may act for another. The master in ordinary has no longer any jurisdiction in such matters, the 35th section of the act (15 & 16 Vict. c. 80) enacting, that from and after the first day of Michaelmas Term, 1852, the 13th, 14th, and 15th sections of 3 & 4 Will. 4, c. 94, shall be repealed, those being the sections conferring upon them the powers until recently exercised by them on such applications. The 26th section of the act (15 & 16 Vict. c. 80) confers the power upon the judges not only in chambers, but as from time to time they may think most convenient.

The application is by summons, which, with a copy to leave in chambers, is prepared by the solicitor and sealed by the judge's clerk. (3rd G. O. 16th Oct., 1852.) The act requires the summons to accord, as near as may be, in form to that now adopted by the judges of the superior courts of common law when sitting at chambers. (15 & 16 Vict. c. 80, s. 28.) The form now in use is as follows:—

In Chancery.

Between A. B. and others, plaintiffs;
and
C. D. and another, defendants.

Let all parties concerned attend at my chambers, No. ——, —— Square, Lincoln's Inn, Middlesex, on ——, the —— day of ——, 1853, at —— of the clock in the —— noon, on the hearing of an application on the part of the defendant C. D., that he may be allowed —— days further time to plead, answer or demur, not demurring alone, to the plaintiff's bill in this cause, and that

the costs of this application may be costs in the cause. Dated this —— day of ——, 1853.

E. F.
Vice-Chancellor.

This summons was taken out by G. H. of No. ——, in the city of London, defendant's solicitor.

To the plaintiffs

The summons to be sealed requires a 3*s.* stamp, and the copy without stamp will be left in chambers. (3rd G. O., 16th Oct. 1852.) The evidence in support of the application may be by affidavit, the office copy of which, and not the original, is read in chambers, and it should show a case of diligence on the part of the applicant, and that the time allowed was insufficient for the putting in of the answer. Previous notice of reading the affidavit should be given to the plaintiff's solicitor (24th G. O., 16th Oct. 1852); and, if required by him, a copy must be furnished, he paying for it at the rate of fourpence per folio. (1st G. O., 25th Oct. 1852.) On the first application further time is granted, almost of course, even without an affidavit. The service of the summons must be two clear days before the return (5th G. O., 16th Oct. 1852), at which time the solicitor may be prepared with a form of order on a 5*s.* stamp, as, if the application be granted, the order may be drawn up immediately after the hearing. But by special leave the return may be earlier. When the opposite party does not attend, there should be an affidavit of service, but this may be produced at any time during the day. It is, however, sometimes dispensed with. Terms will sometimes be imposed on an application of this kind, whether made at chambers or in open court, as where in a suit to stay proceedings at law the defendant obtained time to answer, and then pressed on the action and got judgment, and after considerable delay came again for further time to answer, it was held, that as he came for indulgence, it could only be granted upon the terms of staying execution in the action. (*Zulueta* v. *Vinent*, 15 Beav. 575.)

After an order for further time to answer, the defendant, and in case of his death, his representative, is precluded from demurring alone. (*Granville* v. *Betts*, 18 L. J. 32.) But merely denying combination and demurring to the rest of the bill is not considered not demurring alone (*Weatherhead* v. *Blackburn*, 2 V. & B. 123); but otherwise, if defendant admit a single fact in addition to such denial. (*Tomkin* v. *Lethbridge*, 9 Ves. 179; *Baker* v. *Mellish*, 11 Ves. 73.)

Upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the court shall make other order to the contrary. (32nd G. O., 3rd April, 1828.)

When a demurrer to the whole or part of a bill is allowed upon argument, the plaintiff, unless the court orders to the contrary, is to pay to the demurring party the costs of the demurrer, and if the demurrer be to the whole bill, the costs of the suit also. (45th G. O., 8th May, 1845.)

When a plea to the whole or part of a bill is allowed upon argument, the plaintiff, unless he undertakes to reply to the plea, or the court orders to the contrary, is to pay to the party by whom the plea is filed the costs of the plea, and if the plea be to the whole bill, the costs of the suit also; and in such last-mentioned case, the order allowing the plea is to direct the dismissal of the bill. (48th ibid.)

One solicitor having filed two separate pleas for want of parties for two defendants, which pleas were allowed, the court gave the costs of one plea only (*Tarbuck* v. *Woodcock*, 3 Beav. 289); as when a plea was overruled, with leave to amend it, and, as amended, it was allowed, the costs of the amended plea only were given (*Clayton* v. *Meadows*, 2 Hare, 26); but, without leave, the defendant cannot file a second plea or a demurrer after a plea overruled. (*Rowley* v. *Eccles*, 1 S. & S. 511.)

Upon a demurrer being allowed, the court frequently gives the plaintiff leave to amend.

Upon a plea being allowed, the court may give leave to

amend, or, without allowing it, may order the benefit of it to be saved till the hearing, or may order it to stand for an answer.

See further on the subjects of plea and demurrer under "*Proceedings for Plaintiffs by Bill*," ante.

The answer may contain material statements besides answering the interrogatories, and must be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate and distinct statement or allegation. (15 & 16 Vict. c. 86, s. 14.) Commissions to take pleas, answers, disclaimers and examinations within the jurisdiction of the court are abolished, and any such plea, answer, disclaimer or examination may now be filed without any other formality than is required in swearing and filing an affidavit. (15 & 16 Vict. c. 86, s. 21.)

Pleas, answers, disclaimers and examinations when sworn in London were commonly, and still will frequently be, sworn at the Record and Writ Clerks' Office, Chancery Lane, but now they may also be sworn within ten miles from Lincoln's Inn Hall, before a "London Commissioner to administer Oaths in Chancery." When sworn in the country beyond that distance, they may be sworn before a "Commissioner to administer Oaths in Chancery in England." This is provided for by the 16 & 17 Vict. c. 78, which act also abolishes the office of "Master Extraordinary in Chancery." See more fully on this subject under title "*Affidavits*." Many solicitors have been appointed commissioners under this act.

The taking of a plea, answer or disclaimer out of the jurisdiction is, amongst other things, provided for by the 22nd section of the 15 and 16 Vict. c. 86, which enacts, that all pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations and attestations of honour in this court, and all acknowledgments for enrolling any deed in this court, shall and may be sworn and taken in Scotland, or Ireland, or the Channel Islands, or in any colony, island,

plantation or place under the dominion of her Majesty, before any judge, court, notary public or person lawfully authorized to administer oaths in such places respectively; or in foreign parts out of her Majesty's dominions, before any of her Majesty's consuls or vice-consuls; and the judges and other officers of the Court of Chancery shall take judicial notice of the seal or signature of any such court, judge, notary public, person, consul or vice-consul attached, appended or subscribed thereto or to other documents to be used in this court.

See title "*Affidavits*," for further observations as to administering oaths and other matters in connexion therewith, the remarks there offered applying equally to pleas, answers, disclaimers and affidavits. See also the case there cited as to alterations made in affidavits sworn abroad, which may be also applicable to the several subjects now under consideration.

The defendant is not bound to put in any answer unless interrogatories are filed by the plaintiff, as required by the 16th of General Orders of 7th August, 1852, (A), and a copy delivered, as required by the 17th or 18th of those Orders, according to the fact, whether or not the defendant appears within the time limited, or such copy be delivered within such further time as the court shall direct. (15 & 16 Vict. c. 86, s. 12.)

The oath of the messenger on filing pleas, answers, disclaimers or examinations is abolished, and any alterations made therein previously to the taking thereof are to be authenticated according to the practice in use prior to the operation of the act with respect to affidavits. (15 & 16 Vict. c. 86, s. 25.) A plea, answer, disclaimer or demurrer need not be printed, but is still to be engrossed as before the acts.

The form of the answer may be as follows, with such variations as the nature and circumstances of each particular case may require. (21st General Order, 7th August, 1852, (A).)

Form of Answer.

In Chancery.

John Lee..... Plaintiff;

James Styles and Henry Jones } ..... Defendants.

The answer of James Styles, one of the above-named defendants, to the bill of complaint of the above-named plaintiff.

In answer to the said bill, I, James Styles, say as follows:—

1. I believe that the defendant Henry Jones does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the first of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned.

2. Such charge was created by an indenture dated the first of November, one thousand eight hundred and fifty, made between myself of the one part, and the said defendant Henry Jones of the other part, whereby I granted and conveyed the said farm and premises, subject to the mortgage made by the said indenture of the 1st of May, one thousand eight hundred and fifty, unto the defendant Henry Jones, for securing the sum of two thousand pounds and interest at the rate of five pounds per centum per annum, and the amount due thereon is the said sum of two thousand pounds, with interest thereon, from the date of such mortgage.

3. To the best of my knowledge, remembrance and belief there is not any other mortgage, charge or incumbrance affecting the aforesaid premises.

M. N.
[*name of counsel.*]

In the heading to the answer, the words "The answer of the defendant, E. S.," omitting the words "to the bill of complaint of the said complainant," is sufficient. (*Rabbeth* v. *Squire*, 1 Eq. Rep. 50; 17 Jur. 370.)

Where a defendant is not required to put in an answer, and does not do so, he shall be considered to have traversed the case made by the bill (15 & 16 Vict. c. 86, s. 26); and in such case, by the 28th General Order of 7th August, 1852, (A), issue is nevertheless to be joined by filing a replication in the form or to the effect of the replication now in use. But see the cases cited ante, page 98.

If the defendant puts in his answer before the plaintiff

moves (under the 15 & 16 Vict. c. 86, s. 15) for a decree or decretal order, on the hearing of such motion, the answer will be treated as an affidavit. (15 & 16 Vict. c. 86, s. 15.) And so also will it be upon a motion or petition in any suit for an injunction or a receiver, or to dissolve an injunction or discharge an order appointing a receiver, and affidavits may be received and read in opposition thereto. (15 & 16 Vict. c. 86, s. 59.)

An answer to a supplemental bill or to a plaintiff's statement of facts or circumstances, which have occurred after the institution of a suit under the 15 & 16 Vict. c. 86, s. 53, and the time and mode of taking and filing it, will not vary in any essential particular from an answer to an original bill. The 44th of the General Orders of 7th of August, 1852, (A), provides that such proceedings by way of answer, &c., are to be had and taken upon such a statement, as if the same were embodied in a supplemental bill; but the court may make any order it shall think fit for accelerating the proceedings thereunder or therein, as may appear just and practicable. Neither is there any difference under the new practice between the filing of a plea, answer, disclaimer or demurrer to an original bill, and the same proceedings on an amended bill, the act using the word "bill" only (15 & 16 Vict. c. 86, s. 13), which, therefore, will apply to either case, and the orders requiring a copy of an amended bill to be served on the defendant or his solicitor. (9th General Order of 7th of August, 1852, (A).) A defendant may file a disclaimer within the same time as is allowed him to answer, a disclaimer being a species of answer and sometimes being contained in an answer giving discovery, which the defendant cannot always resist, even though he disclaim.

Where the general costs of the suit were reserved, the costs of disclaiming defendants were ordered to be paid by the plaintiff without prejudice to the question by whom and out of what fund they ought eventually to be borne. (*Jones* v. *Powell*, 13 Beav. 433.)

A defendant who has put in his answer, is entitled to obtain copies of the answers of the other defendants.

Should the defendant answer only, and answer sufficiently, he may then consider it expedient to require an answer from the plaintiff on the matters in question, which he is enabled to do by filing interrogatories.

DEFENDANT'S INTERROGATORIES.

This proceeding is intended to take the place of a cross bill of discovery, but the defendant is not precluded from filing a cross bill if he prefers it. In some cases it may be thought better to resort to the latter proceeding, and the defendant is left at perfect liberty to do so. The 15 & 16 Vict. c. 86, s. 19, provides that in any suit, whether by bill or claim, and without a cross bill, but in a suit by bill when the defendant is required to answer only after the defendant has put in a sufficient answer, the defendant may file interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and deliver a copy thereof to the plaintiff or his solicitor; and the plaintiff shall be bound to answer as if the same had been contained in a bill of discovery filed by the defendant against the plaintiff on the day when such interrogatories shall have been filed, and as if the plaintiff had on the same day duly appeared, but the defendant may file a cross bill of discovery instead of such interrogatories.

At present the time does not appear to be limited for the defendant to file his interrogatories, which would seem to be an omission. The General Orders do not refer to the subject, and the act does not prescribe the time either for filing the defendant's interrogatories, or for delivering a copy to the plaintiff or his solicitor. Whatever may be the time allowed to the plaintiff to put in his answer (this also being left in great uncertainty), that time is made to run from the time of

filing of the defendant's interrogatories. [For further observations as to the preparation, filing and delivering copies of interrogatories, see title "*Proceedings for Plaintiffs by Bill,*"—"*Plaintiff's Interrogatories.*"]

No appearance by the plaintiff is necessary. Neither the acts nor the orders require interrogatories to be printed, and as to interrogatories filed by a defendant, no particular form is given; but the form given by the 15th of the General Orders, 7th August, 1852, (A.), for a plaintiff's interrogatories, is that generally adopted for those of a defendant. They should be signed by counsel. There is not any direction whether a defendant must serve an office copy of his interrogatories upon the plaintiff, nor whether it must be stamped or examined by an officer of the court, although in the case of a plaintiff filing interrogatories, all these particulars are carefully provided for. The practice is, however, the same in both cases.

Leave was given to a defendant to file interrogatories, before the expiration of the time allowed for excepting, but at his risk, if the answer turned out to be insufficient, of having them taken off the file with costs. (*Sibbald* v. *Lawrie*, 20 L. T. 320.)

EXCEPTIONS TO PLAINTIFF'S ANSWER.

The defendant may on the coming in of the plaintiff's answer, except thereto for scandal and insufficiency within the same time as is allowed to a plaintiff excepting to the answer of a defendant. The same regulation must govern both cases, the 19th section of the act 15 & 16 Vict. c. 86, providing that the practice with reference to exceptions for insufficiency and scandal shall extend to answers of plaintiffs to defendants' interrogatories. The same section provides, that the court in deciding thereon is to have regard to statements in the original bill and answer of the defendant exhibiting such interrogatories, when the suit is by bill, and when by claim, to the statements in the claim and in the

affidavits in support of and in opposition thereto. By the 17th section, exceptions for impertinence are abolished. [See also "*Exceptions to Defendant's Answer*," under "*Proceedings for Plaintiffs by Bill.*"]

CROSS BILL.

The proceedings relating to a cross bill follow the practice applicable to other bills, original in their nature, subject always to any special orders of the court and the general rules recognized by the court with reference to bills of this description, which are not disturbed by the recent alterations of practice. A cross bill may be either for discovery or relief, or both. It is filed by a defendant to an original cause against the plaintiff. A defendant may now, however, examine a plaintiff on interrogatories without a cross bill (see ante), but this power does not preclude him from filing a cross bill of discovery if he thinks fit. The plaintiff in the cross suit may enlarge publication, or the time for closing evidence in the original suit, until after the answer in the cross suit has been filed. (*Creswick* v. *Creswick*, 1 Atk. 291.) The reason for this is, that the examination of witnesses in the cross suit must, after the expiration of the time for closing evidence in the original cause, be confined to matters in issue in the cross cause, which may not answer the purpose of the plaintiff in the latter suit. Also, the plaintiff in the cross suit must, if required, file his answer in the original suit before he can compel his opponent to file his answer in the cross suit (*Harris* v. *Harris*, Turn. 165); except where the plaintiff in the original suit amends his bill, so as to render an answer to the amendments necessary, in which case he forfeits that advantage. (*Steward* v. *Roe*, 2 P. Wms. 434; *Long* v. *Burton*, 2 Atk. 218.) An order of course, however, is necessary to extend the time for answering the cross bill, which order may be obtained by motion or petition of course.

Both causes should be heard together; and if one is set

down for hearing before the other, the latter may be advanced. For this purpose also, an order of course may be obtained in like manner.

By the 41st General Order, August, 1841, it is provided, that where a cross bill of discovery only is filed, the costs thereof and of the answer thereto are in the discretion of the court at the hearing of the original cause; and by the 42nd ibid. the answer to such a bill may be read and used by the party filing such bill, in the same manner and under the same restrictions as the answer to a bill praying relief. And the 125th General Order, 8th May, 1845, declares, that the costs of a cross bill of discovery are to be costs in the original cause, unless the court otherwise orders.

MOTION TO DISSOLVE INJUNCTION.

To dissolve an injunction under the new practice, whether before or after answer, the defendant may file affidavits as well as examine witnesses vivâ voce, the answer being regarded merely as an affidavit for the purposes of this motion. The plaintiff may also file affidavits in opposition to the answer, and either party may cross-examine his opponent's witnesess, whether they are examined orally in chief, or have merely made affidavits for the purposes of the motion. See further as to this proceeding of dissolving an injunction, and the evidence in support thereof, ante, under title "*Injunction.*"

APPLICATION TO DISCHARGE A RECEIVER.

This application is made by motion with notice, and both with reference to the defendant's answer being read as an affidavit and the evidence to be used, whether in aid of or in opposition to the motion, the observations made supra respecting a motion to dissolve an injunction will apply.

PRODUCTION AND INSPECTION OF DOCUMENTS.

After a defendant has put in a full and sufficient answer

in suits in which he is required to answer, or before answer when not required by the plaintiff to answer, he may require production by the plaintiff on oath of such documents in the plaintiff's possession or power relating to the matters in question as he considers material to obtain production of for the purposes of his defence, and the court may deal with them when produced as shall appear just. (15 & 16 Vict. c. 86, s. 20.) The court has settled an order requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce, and a defendant is entitled of right to such an order for production, and delay in making the application does not deprive him of it. (*Rochdale Canal Company* v. *King*, 15 Beav. 11; 9 Hare, App., 49, n.) As the defendant must first put in a full and sufficient answer when required to answer, he cannot make this application as a matter of right until six weeks after his answer has been filed, that being the time allowed to the plaintiff by the General Orders of the 2nd November, 1850, for excepting to the answer. Before that time has elapsed he cannot tell whether his answer is considered sufficient or not; but the court may relax the strictness of this rule, the words of the section being "not until he has put in a full and sufficient answer, unless the court shall order to the contrary," which doubtless the court will do where the justice of the case manifestly requires it. The latter part of the section, enabling the court to deal with the documents when produced, means that it may give inspection, copies or abstracts, or extracts, to the defendant, and otherwise deal with them as may be necessary. The application for production is, in the first instance, to be by summons at chambers, as pointed out under "*Proceedings for Plaintiffs by Bill*" under this head, where also the mode of proceeding is shown, and various cases are cited in reference to the course of the court.

A defendant to an information requiring production of documents in the possession of the parties conducting the

suit, should apply to the Attorney-General. (*Att.-Gen.* v. *Clapham*, 10 Hare, App., 37.) The 20th section does not enable a defendant to obtain an order for production of documents in the possesssion of a co-defendant; but in such case a cross bill may be necessary. (Ibid. 45.)

MOTION FOR DECREE OR DECRETAL ORDER.

If the plaintiff should now or at any other stage of the suit, when permitted to do so, move for a decree or decretal order, which he may at any time after the time allowed for the defendant to answer has expired, provided further time be not granted by the court to plead, answer, or demur, but before replication, the defendant will defend himself, as upon any other motion, by affidavit or vivâ voce testimony.

The defendant's answer being put in will make little or no difference on this proceeding, as it will be treated as an affidavit only (15 & 16 Vict. c. 86, s. 15), and the evidence (except as to affidavits) will proceed on the same regulations as that upon a motion for an injunction, to which title, under "*Proceedings for Plaintiffs by Bill*," reference may be made for more particular information.

Affidavits in opposition to this motion must be filed within fourteen days after service of the notice of motion, and the defendant must furnish the plaintiff or his solicitor with a list thereof. (24th G. O., 7th August, 1852, (A).) But if the fourteen days within which, pursuant to the orders of the court, a defendant is bound to file his affidavits in answer to a motion for a decree, or the seven days within which the plaintiff is bound to file his affidavits in reply thereto, or the nine weeks after issue joined within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such nine weeks within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively

is extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order: provided always, that in cases where the above-mentioned periods of fourteen days and nine weeks respectively shall be so extended, the seven days within which the plaintiff is bound to file his affidavits in reply, and the month during which a witness is subject to cross-examination, shall be respectively taken to commence from the expiration of such extended period. (1st G. O., 1st June, 1854.)

If the plaintiff's affidavits in reply are not confined to matters strictly in reply they are not to be regarded by the court except so far as they are in reply, unless upon the hearing of the motion the court shall give leave to the defendant to answer them, in which case the costs thereof and of the further affidavits consequent thereon shall be paid by the plaintiff, unless otherwise ordered. (25th G. O., 7th August, 1852, (A).)

No further evidence on either side can be used on this motion without leave of the court. (26th ibid.)

[For further observations on this subject, see title "*Motion for Decree or Decretal Order*," under "*Proceedings for Plaintiffs by Bill.*"]

DISMISSAL OF BILL FOR WANT OF PROSECUTION.

By the 27th section of the act 15 & 16 Vict. c. 86, and the 29th of the Orders of the 7th August, 1852, (A), a defendant not required to answer the bill, and who has not answered it, may move to dismiss the bill at any time after the expiration of three months from the time of his appearance, unless a motion for a decree or decretal order shall have been set down in the meantime, or the cause shall have been set down to be heard; and the court may upon such application, if it shall think fit, make an order dismissing the bill, or make such other order or impose such terms as may appear just and reasonable.

All other cases of want of diligence in prosecuting a suit must be met by the Orders of the 8th of May, 1845, which, however, in some cases require to be moulded to the new acts and orders, in order to avoid difficulty in adapting those orders to the new practice. It may be useful in such cases to observe as a rule that the new acts and orders must overrule the General Orders of May, 1845.

The 16th Order of 8th May, 1845, Art. 34, provides, that the plaintiff, having obtained an order for leave to amend his bill, has, in all cases in which such order is not made without prejudice to an injunction, fourteen days after the date of the order within which he may amend such bill.

If such bill be not amended within such fourteen days, the order for leave to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

The 35th Art. of the same Order provides, that the plaintiff, having obtained an order for leave to amend his bill without prejudice to an injunction, must amend such bill within seven days from the date of the order.

If such bill be not amended within such seven days, the order for leave to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

The 37th Art. provides, that the plaintiff (not obtaining an order for leave to amend his bill) must either file his replication or set down the cause to be heard on bill and answer within four weeks after the last answer is deemed or found to be sufficient.

Otherwise any defendant may move to dismiss the bill for want of prosecution.

The 39th Art. provides, that where the plaintiff amends his bill without requiring an answer to the amendments, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the notice of the amendment of such bill, the plaintiff is,

after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication, or to set down the cause to be heard upon bill and answer.

Otherwise any defendant may move to dismiss the bill for want of prosecution.

The 40th Art. provides, that where the plaintiff amends his bill without requiring an answer to the amendments, and a defendant, within eight days after the service of the notice of the filing of the amended bill, serves a warrant for further time to answer the amendments, but the Master refuses to grant such further time, the plaintiff is, within fourteen days after such refusal, either to file his replication or to set down the cause to be heard on bill and answer.

Otherwise any defendant may move to dismiss the bill for want of prosecution.

The 41st Art. provides, that if a defendant puts in an answer to amendments to which the plaintiff has not required an answer, the plaintiff must, within fourteen days after the filing of such answer, either file his replication or set down the cause to be heard on bill and answer, unless in the mean time he obtains from the court a special order for leave to except to such answer or to amend the bill.

Otherwise any defendant may move to dismiss the bill for want of prosecution.

The 45th Art. provides, that, within four weeks after publication has passed, the plaintiff is to set down his cause and obtain and serve a subpœna to hear judgment.

Otherwise any defendant may move to dismiss the bill for want of prosecution.

The 114th Order of 8th May, 1845, provides, that any defendant may, upon notice, move the court that the bill may be dismissed, with costs, for want of prosecution, and the court may order accordingly,

1. If the plaintiff, having obtained no order to enlarge the time, does not obtain and serve an order for leave to

amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, within four weeks after the answer, or the last of the answers, is found or deemed to be sufficient, or after the filing of a traversing note; or

2. If the plaintiff, having undertaken to reply to a plea to the whole bill, does not file his replication within four weeks after the date of his undertaking; or

3. If the plaintiff, having obtained no order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend; or

4. If the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a subpœna to hear judgment within four weeks after publication has passed.

The words "last of the answers" mean the last of the answers filed by the defendant moving. (*Dalton* v. *Hayter*, 7 Beav. 586; 15 L. J. 33; 9 Jur. 1000; *Sprye* v. *Reynell*, 10 Beav. 351; 16 L. J. 286; 11 Jur. 484.)

The 115th Order provides, that where the plaintiff has, after answer, amended his bill without requiring an answer to the amendments, any defendant may, upon notice, move to dismiss the bill, with costs, for want of prosecution, if the plaintiff, having obtained no order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer, within the times following; viz.

1. Within fourteen days after service of notice of the amendment of the bill, in cases where the defendant does not desire to answer the amendments.

2. Within fourteen days after the Master's refusal to allow further time, in cases where the defendant, desiring to answer, has not put in his answer within eight days after the service of notice of the amendment of the bill, and the Master has refused to allow further time.

3. Within fourteen days after the filing of the answer in cases where the defendant has put in an answer to the

amendment, unless the plaintiff has within such fourteen days obtained from the court a special order for leave to re-amend the bill.

The 118th Order provides, that a defendant is not to be at liberty to move to dismiss a bill for want of prosecution until after the expiration of the time within which a plaintiff may obtain an order to amend such bill.

The only evidence generally required in support of this motion is the record and writ clerk's certificate, showing the date of the proceedings upon which the motion is founded, unless in special cases it be necessary to inform the court of any additional facts not usually required. The fee to counsel is one guinea.

A defendant in contempt cannot move to dismiss for want of prosecution. (*Anon.*, 15 Ves. 174.)

On a motion to dismiss a bill for want of prosecution, the court will not, without evidence on the part of the plaintiff or the defendant's consent, give leave to amend the bill; and in support of such a motion, the certificate of the filing of the defendant's answer must be produced to the registrar. (*Freeston* v. *Claydon*, 22 L. J. 640.)

When a cause is at the hearing ordered to stand over, with liberty to amend, and the plaintiff neglects to amend, the defendant should move upon notice that the plaintiff may amend within a specified time, or that the bill may stand dismissed. (*Emerson* v. *Emerson*, 6 Hare, 442; 18 L. J. 50; 12 Jur. 973.)

Where the plaintiff has not been diligent in getting in the answers, he must pay the costs of such defendants as are in a position to move to dismiss, and do so move, and will also be put upon terms to speed; it is his duty to inform such defendants of the cause of delay. (*Adair* v. *Barrington*, 2 Eq. Rep. 408.)

The plaintiff may oppose the motion to dismiss, by showing that he has used all due diligence in the prosecution of the suit, or by filing replication, if in a position to do so; but he must bear in mind that he is not entitled to file more

than one replication, without the leave of the court. See "*Joining Issue,*" ante.

The General Order of 13th April, 1847, deprives a plaintiff of the power he formerly had of obtaining an order of course to amend, after a defendant entitled to move has served a notice of motion to dismiss the bill for want of prosecution. Any order of this kind must now therefore be a special order.

In the first-mentioned case, the court will exercise its discretion as to dismissing the bill, and also as to costs, though as a general rule, when the bill is dismissed, it is dismissed with costs; but see *Kemball* v. *Wallduck*, 18 Jur. 69, where no costs were given, notwithstanding the dismissal. See also *Sutton Harbour Improvement Company* v. *Hitchens*, 15 Beav. 161, where the suit becomes useless by reason of subsequent circumstances, and being instituted on the authority of a reported case, the court having jurisdiction to dismiss without costs. In the last-mentioned cases, the plaintiff must pay or tender the costs which the defendant has incurred in giving the notice of motion, and which are 20*s.*, unless he has delivered his brief (see *Wright* v. *Angle*, 6 Hare, 109; 12 Jur. 34; *Piper* v. *Gettens*, 11 Sim. 282), from which also it appears that if the defendant refuses to accept the costs so tendered, but brings on his motion, he must pay the plaintiff's costs. On the other hand, if the plaintiff omits to tender such costs, the defendant is right in going to a hearing, and he will obtain his full costs by so doing. (*Att.-Gen.* v. *Cooper*, 9 Sim. 379.)

According to the 4 Anne, c. 16, s. 23, where a bill is dismissed for want of prosecution, the plaintiff is to pay to the defendant or defendants his or their full costs, to be taxed by the Master; but, as above observed in the case of *Kemball* v. *Wallduck*, the Vice-Chancellor Stuart refused to give any costs, though he dismissed the bill; but in *Stagg* v. *Knowles*, 3 Hare, 241, the court refused to enter into the merits of the case for the purpose of determining the question of costs,

and this, it is presumed, has been the almost uniform practice. (See *Sutton Harbour Improvement Company* v. *Hitchens*, 15 Beav. 161.)

The 124th General Order of May, 1845, provides, that when a bill is dismissed with costs, the taxing master may tax such costs without any order referring the same for taxation, unless the court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the costs to be certified by the taxing master are to be recovered by subpœna.

It has been held that the court has jurisdiction to dismiss a bill without costs, where the suit becomes useless by reason of subsequent circumstances. (*Sutton Harbour Improvement Company* v. *Hitchens*, 15 Beav. 161.)

When an abatement of the suit occurred by death or bankruptcy or otherwise of a plaintiff, the defendant might move, on notice, for an order that the surviving plaintiffs, or the representatives or the assignees, as the case might be, might, within a given time, revive the suit or make themselves parties, or that the bill might stand dismissed with costs; and the 63rd General Order of May, 1845, provides, that in cases where a suit abates by death of a sole plaintiff, the court, upon motion of any defendant made on notice served on the legal representative of the deceased plaintiff, may order that such legal representative do revive the suit within a limited time, or that the bill be dismissed. And when by the death of a defendant the suit becomes abated, his representatives might move that the plaintiff be ordered to revive, or that the bill be dismissed. (*Norton* v. *White*, 2 De G., M. & G. 678.) As to this and also how far it is competent to either party to revive, and that without notice under the new practice, see ante, "*Revival of Suit.*"

When on a motion to dismiss the plaintiff is put under terms, or the bill to be dismissed with costs, the terms must be strictly complied with, otherwise the suit is at an end; and where a plaintiff partly performed the terms, but by

mistake omitted to do one act, the defendants proceeded to to tax their costs of suit, and the plaintiff thereupon moved to restrain them from proceeding with the taxation; but the Master of the Rolls held that as the suit was gone, the form of motion should have been to restore the bill, and also that the plaintiff had not made a case of indulgence, or for the restoration of the suit, and dismissed the motion with costs. *Bartlett* v. *Harton*, 17 Jur. 1019.)

A motion to dismiss, for want of prosecution, a bill of discovery, but which was styled a "bill of complaint," and contained, besides the usual prayer for discovery, a prayer that such other orders might be made upon the defendants as the nature of the case might require, was refused, the court holding that it was notwithstanding a mere bill of discovery, and an application to the court was unnecessary; but as the prayer was unusual, the motion was refused without costs. (*The South-Eastern Railway Company* v. *The Submarine Telegraph Company*, 17 Jur. 1044; 22 L. T. 94.)

A suit for a receiver pendente lite is never brought to a hearing, and therefore a motion to dismiss for want of prosecution was refused with costs. (*Edwards* v. *Edwards*, 17 Jur. 826; 22 L. J. 1055.)

EVIDENCE FOR THE HEARING.

The defendant not moving to dismiss for want of prosecution, or taking that step and failing, and not pleading or demurring to the bill, nor disclaiming any interest in the matter in question, but putting in an answer which he desires to substantiate, and the plaintiff not moving for a decree or decretal order, but filing a replication, the defendant will immediately proceed to ascertain, and if necessary from counsel, the nature and particulars of the evidence his case requires to sustain it; and being satisfied on this point, will go on to prove his case, which will be done, if issue was joined in the cause before the 2nd November, 1852, accord-

ing to the present practice, unless by consent or special order of the court (39th G. O., 7th August, 1852 (A)); but if issue was joined on or after that day, then it will be ordinarily by oral evidence or by affidavit, as the case may be. With a view to determine whether the evidence shall be oral or by affidavit, the plaintiff is allowed seven days after issue joined, within which he may state to the defendant by notice his preference; but any defendant may prevent the general evidence being given by affidavit by giving the plaintiff or his solicitors notice that he requires it to be oral within fourteen days after the expiration of such seven days. (15 & 16 Vict. c. 86, s. 29.) This subject, however, has been fully entered into, under "*Proceedings for Plaintiffs by Bill,*"—"*Evidence for the Hearing,*" where the remarks will be found equally applicable to a plaintiff and to a defendant.

ENLARGING PUBLICATION OR THE TIME FOR CLOSING EVIDENCE.

The defendant wishing to have the time extended for taking evidence for the hearing will pursue the same course as is pointed out for a plaintiff. [See ante.]

THE HEARING OF THE CAUSE AND THE DECREE THEREON.

For observations on this subject, which may be equally useful to the plaintiff and the defendant, see "*Proceedings for Plaintiffs by Bill,*" ante.

III. Proceedings for Plaintiffs by Claim.

PARTIES TO A SUIT.

By the 3rd rule of the 42nd section of the act 15 & 16 Vict. c. 86, any residuary devisee or co-heir may, without serving any co-residuary devisee or co-heir, have a decree for the administration of the estate of a deceased person; by the 4th rule of that section, any one of several cestuis que trust under the deed or instrument may, without serving any other of such cestuis que trust, have a decree for the execution of the trusts of the deed or instrument; by the sixth rule of the same section, any executor, administrator or trustee may obtain a decree against any one legatee, next of kin or cestui que trust, for the administration of the estate or the execution of the trusts; and by the 9th rule of that section, in all suits concerning real or personal estate vested in trustees, such trustees shall represent the persons interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate, and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit. This rule applies not only to administration suits, but to all suits where the interest of the cestui que trust is represented by and his powers are vested in the trustee. (*Fowler* v. *Bayldon*, 9 Hare, App., 78.) In all such of the above cases as are included in the 3rd, 4th and 6th rules, the court may require any other persons to be made a party or parties to the suit.

The 44th section, empowering the court to proceed in the absence of a legal personal representative of a deceased person, formerly interested in the matters in question, or to appoint a person to represent the estate for all the purposes of the suit or proceeding, and the 49th section, empowering the

court effectually to deal with suits in which the plaintiffs are misjoined, and instead of dismissing the bill to make an effective decree, treating plaintiffs as defendants, and to direct necessary amendments, and to order a cause at the hearing to stand revived, where the only plaintiff having an interest has died, and to proceed to a decision of the cause, as well as the 51st section, enabling the court to adjudicate between some only of the parties interested, or in respect of some only of the property comprised in a settlement, will or other instrument, without making the other persons parties, or requiring the whole of the trusts and purposes to be executed, or taking the accounts, or ascertaining the particulars or amount of the property, and also the 52nd section, by virtue of which, on a suit becoming abated or defective, the persons who would, according to the former practice, have been defendants to a bill of revivor or supplement shall now, on being served with an order to revive or supplemental order, to be obtained as of course, and without any bill of revivor or supplement filed, thenceforth become parties to the suit and be bound to enter an appearance,—and all of which four last mentioned sections are more fully referred to under "*Proceedings for Plaintiffs by Bill*,"—are equally applicable to suits by claim.

When an executor or administrator of any deceased person seeks to have the personal estate of such deceased person administered under the directions of the court, any one of the residuary legatees, or of the persons entitled to the personal estate of an intestate, and the co-executor or co-administrator (if any) of the plaintiff, may be named as defendants to the suit; and, in the first instance, no other person need be therein named. (7th G. O., 22nd April, 1850.) In other cases, the only person who need be named as defendant in the first instance is the person against whom the relief is directly claimed. (8th ibid.) These words, "in the first instance," occurring in the 8th Order, have been construed by Vice-Chancellor Turner as being intended to enable the claimant to proceed against one party in the first

instance, and then, if the court required the presence of others, it might give those directions at the hearing of the claim, and as meaning that one party might be served in the first instance upon the chance of his coming and giving the relief required. (*Penny* v. *Penny*, 20 L. J. 339; 9 Hare, 39; 15 Jur. 445.)

The 13th of the Orders of April, 1850, expressly empowers the court to give such directions at the hearing. In a legatee's claim against a surviving executor who denies assets, the representatives of the deceased co-executors are necessary parties, and the 32nd Order of August, 1841, does not alter the case. (Ibid.)

It was held to be no objection to a claim filed by parties interested in a testator's estate, to render the defendant liable for the loss of the produce of freehold property, part of that estate, that an incumbrancer of such freehold was not a party to the suit, as he might appear before the master under the 18th Order of April, 1850. (*Brook* v. *Biddall*, 15 Jur. 762.) That order enables the master to certify what persons, not already parties, ought to attend or be enabled to attend the proceedings before him; and upon production of such certificate to the record and writ clerk the plaintiff might sue out a writ of summons, requiring such persons to appear to the writ, and they are thereupon to be named and treated as defendants to the suit. The persons summoned, having appeared, were to be at liberty to attend, and to be entitled to notice of the proceedings before the master, under the order of reference, subject to such directions as the master may make in respect thereof. (20th Order.) Under the 18th Order above referred to, the court, upon the master's certificate and the motion of a defendant, ordered the defendant to be at liberty to issue the writ of summons, the plaintiff having since the hearing neglected to take any proceedings in the suit. (*Turnbull* v. *Warne*, 2 De G. M. & G. 281; 19 L. T. 119.) Substituting service of printed claim for service of writ of summons, this order may be adapted to the present practice.

On a claim by a mortgagee asking either a foreclosure or a sale, there being interested in the equity of redemption a tenant for life, a trustee upon certain trusts, and other parties, and the cestuis que trust not being before the court, Vice-Chancellor Stuart refused to make the order, unless the cestuis que trust were parties, or an affidavit were filed showing that they had notice of the application. (*Tuder* v. *Morris*, 21 L. T. 150.)

In a claim for an administration, some of a class who, under a particular construction of the will, might be intended to take, were permitted to represent that class. (*Major* v. *Morley*, 19 L. T. 244.) A claim cannot be filed against an executor de son tort, by a creditor of an intestate, for administration of the estate, without making the legal personal representative a party, even though the executor de son tort had previously pleaded plene administravit to an action by the creditor, and judgment was recovered therein quando acciderunt. (*Creasor* v. *Robinson*, 18 L. T. 82; 15 Jur. 1049.) In a claim for specific performance of an agreement by a railway company to purchase land from trustees, the persons beneficially interested are not necessary parties. (*Potts* v. *The Thames Haven Dock Railway Company*, 15 Jur. 1004.) A claim by an equitable mortgagee against the assignee of the mortgagee, asking for a sale, and either that the other mortgagee might be summoned before the master, or that a decree might be made to ascertain what mortgages there were, and their priorities, will not stand. (*Burgess* v. *Sturgis*, 18 L. T. 133.) Where one executor files a claim against his co-executors for the administration of the testator's estate, it is necessary that at least one of the persons beneficially interested in the estate should be made a party, even if it be a common claim. (*Leslie* v. *Smith*, 18 L. T. 119; 15 Jur. 1120.)

The joining in a claim parties whose interest is contingent, to ask for the preservation of a fund, is not multifarious, nor a misjoinder of parties. (*Davies* v. *Davies*, 21 L. J. 543.)

A testator died in the Mauritius, having appointed executors there, and left the residue of his property to his mother in England. The executors transmitted the residue to England, but the mother of the testator having died, the money was paid to her executors, who paid all her debts, exceeding the amount received. A creditor of the testator filed a claim for payment of his debt, or to have the testator's estate administered, and the Vice-Chancellor Knight Bruce held that the executors in the Mauritius were improperly made parties, and that the plaintiff could not have relief against the executors of the mother without a legal personal representative of the testator in this country being made a party to the suit. (*Silver* v. *Stein*, 21 L. J. 312.) The principle of this decision appears to be that also laid down in *Tyler* v. *Bell*, 2 My. & Cr. 106; *Lowry* v. *Fulton*, 9 Sim. 104; *Carmichael* v. *Carmichael*, 2 Phill. 101; and *Reeves* v. *The Duke of Wellington*, 9 Beav. 579; viz. that no estate of a deceased person can be administered in the absence of a legal personal representative, constituted such by the courts of this country.

On a claim by a mortgagee of part of the beneficial interest in real estate against the heir at law of the surviving trustee, asking the appointment of new trustees, to which none of the cestuis que trust were parties, the court declined to direct an inquiry as to the parties beneficially interested, but directed the claim to stand over, with leave to amend. (*Weatherell* v. *Garbett*, 20 L. T. 178.)

THE CLAIM.

It may be proper at once to observe that under the 31st of the General Orders of 22nd April, 1850, the plaintiff is still at liberty to seek his relief by bill as if those orders had not been made, in any of the cases enumerated in the 1st of those Orders, if they involve or are attended by such special circumstances affecting either the estate or the personal conduct of the defendant as to require special relief; and that,

on the other hand, by the 32nd Order, if any suit for any of the purposes to which the form set forth in Schedule (A) to those orders are applicable shall be commenced by bill and prosecuted to a hearing in the usual course, if at the hearing it shall appear to the court that a claim would have answered the plaintiff's purpose equally well, the court may order the increased costs occasioned by the proceedings by bill to be borne and paid by the plaintiff. But where the court found a difficulty in dealing with the case as presented by claim, although a good case might probably be made by the plaintiff by bill, it dismissed the claim without costs, and without prejudice to the plaintiff's right to file a bill. (*Rawlings* v. *Dalgleish*, 1 Sim. & Gif. 76.) And a mortgage was held not chargeable with increased costs occasioned by his proceeding to foreclose by bill instead of by claim. (*Holford* v. *Yates*, 10 Hare, App. 40.)

By the 1st General Order, 22nd April, 1850, it is provided, that any person seeking equitable relief may, without special leave of the court, and instead of proceeding by bill of complaint in the usual form, file a claim in the record and writ clerk's office in any of the following cases; that is to say, in any case where the plaintiff is or claims to be,

1. A creditor upon the estate of any deceased person, seeking payment of his debt out of the deceased's personal assets.

2. A legatee under the will of any deceased person, seeking payment or delivery of his legacy out of the deceased's personal assets.

3. A residuary legatee, or one of the residuary legatees, of any deceased person, seeking an account of the residue, and payment or appropriation of his share therein.

4. The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof.

5. An executor or administrator of any deceased person,

seeking to have the personal estate of such deceased person administered under the directions of the court.

6. A legal or equitable mortgagee, or person entitled to a lien as security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

7. A person entitled to redeem any legal or equitable mortgage or any lien, seeking to redeem the same.

8. A person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.

9. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

10. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.

11. A person entitled to have a new trustee appointed, in a case where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

By the 35th ibid., it is provided, that in these orders and the schedules, the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; viz.

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number;

2. Words importing the masculine gender include females:

3. The word "affidavit" includes "affirmation" and "declaration on honour:"

4. The word "person" or "party" includes a body politic or corporate:

5. The word "legacy" includes "an annuity" and a specific as well as a pecuniary legacy:

6. The word "legatee" includes "a person interested in a legacy:"

7. The expression "residuary legatee" includes "a person interested in the residue."

Unless the claim be special in its nature, that is to say, not provided for by the common forms given in the before-mentioned orders, it need not be settled or signed by counsel, although perhaps invariably it is so settled. The difference between a special and a common claim is not, however, simply that the former does not fall within the strict letter of the orders, as many cases not in terms provided for by the forms have been admitted as common claims (*Pownall* v. *Durkin*, 19 L. J. 571; *Smith* v. *Smith*, 19 L. J. 571; 14 Jur. 518; *Rolling* v. *Hargreaves*, 19 L. J. 571; 14 Jur. 543; *Hanson* v. *Games*, 19 L. J. 571); and a claim embracing the objects of two claims, falling within the 1st Order, will be considered a common claim, and no leave is requisite to file it. The orders relating to claims are liberally construed. (*Smith* v. *Smith*, 14 Jur. 518; *Pownall* v. *Darcutt*, 14 Jur. 519.) Nevertheless a claim to execute the trusts of a will disposing of part of a testator's estate and to administer the residue is special, and requires leave to file it. (*Lloyd* v. *Betteley*, 17 L. T. 42.) So also a claim for foreclosure by mortgagee, with power of sale and a proviso that the power should not prejudice his right to foreclose or his other rights as mortgagee. (*Varney* v. *Forward*, 22 L. J. 247.)

A special claim must be settled and signed by counsel.

The subjects of special claims are numerous, embracing, amongst others, the following, viz.:—the establishment of wills; performance of trusts and administration of estates (*Rickford* v. *Young*, 12 Beav. 537); the taking of accounts at the suit of an administrator de bonis non of a testator's estate, he being also the representative of the sole residuary legatee, of personal estate received by the representatives of two deceased executors of the testator (*Robson* v. *Jefferson*, 14 Jur. 518); special cases of specific performance (*Thompson* v. *Wilberforce*, 14 Jur. 518; *Anon.*, 22 L. J. 257; and see 15 L. T. 296, 325); the distribution of trust

estate (*Brooke* v. *Biddall*, 14 Jur. 518); to obtain at the suit of a legatee arrears of an annuity charged on real and personal estates (19 L. J. 572); for leave to a cestui que trust to sue in the names of executors (*Macdermott* v. *Ward*, 14 Jur. 518); election (19 L. J. 572); partition (19 L. J. 572); production of deeds under covenant (15 L. T. 363); appointment of new trustees where trustees refuse to act (*Frith* v. *Brindle*, 14 Jur. 518); the establishment of a will against co-heiresses (19 L. J. 311); cases of administration generally, not within the forms of the orders, and extending to real as well as personal estate; partnership accounts. (*Cramer* v. *Jennings*, 14 Jur. 518.)

A claim should not pray for an injunction (15 L. T. 246, 296; 14 Jur. 568, 846); but may ask for a receiver (14 Jur. 847; 15 L. T. 296; *Anderson* v. *Guichard*, 17 L. T. 293); and may be taken off the file for multifariousness. (14 Jur. 613; 15 L. T. 246.) As to a claim seeking the removal of trustees, and making a case of wilful default, the Vice-Chancellor Turner discountenanced the practice. (*Eccles* v. *Cheyne*, 20 L. J. 631; 17 L. T. 283; 15 Jur. 744), dismissing so much of the claim with costs.

It is necessary that a claim as well as a bill sufficiently put the facts in issue (*Johns* v. *Mason*, 15 Jur. 390; 17 L. T. 118; *Whittington* v. *Corder*, 16 Jur. 1034); and that the case made by it be proved secundum allegata et probata, the Orders of 22nd April, 1850, not being intended to alter the ordinary rule of the court in that respect. (*Johns* v. *Mason*, 15 Jur. 390; 17 L. T. 118.) In a claim for administration by a residuary legatee against an executor of an executrix not having proved, it is not sufficient to aver merely that the defendant is executor of his testatrix, and that his testatrix was executrix of the testator in the cause. (*Boulding* v. *Boulding*, 16 Jur. 1154.) A claim must also disclose all the facts in the plaintiff's knowledge, or it will be dismissed with costs if the fact or facts suppressed be material in the view taken by the court. (*Goode* v. *West*, 15 Jur. 1025; 21 L. J. 127.)

A common claim being filed to embrace the objects of a special claim was on the hearing permitted to be filed nunc pro tunc as a special claim, but the costs of a motion by the defendant to take the common claim off the file were ordered to be paid by the plaintiff. (*Matthews* v. *Pincomb*, 20 L. J. 395; 17 L. T. 301.)

A claim must contain specific allegations to ground special inquiries necessary to be made, or it will fail (*Penny* v. *Penny*, 9 Hare, 39; 20 L. J. 339; 15 Jur. 445); but in that case the Vice-Chancellor Turner preferred that a bill should be filed instead of the claim, which he dismissed.

A claim by an alleged creditor against the estate of a deceased debtor, such creditor having become so by voluntary assignment of the debt from the executrix of the original creditor, cannot be sustained. (*Sewell* v. *Moxsy*, 18 L T. 270.) A claim for the administration of the real estate of a testator will not be allowed pending a decree in another suit for administration of the same testator's personal estate under which the accounts have not been taken. Where one of three trustees sought by claim to be discharged from the trusts and to have another person appointed in his stead, there not being any material change of circumstances from those in which he accepted the trusts, the court ordered the appointment of a new trustee in his place, but refused the plaintiff his costs. (*Porter* v. *Watts*, 18 L. T. 315; 21 L. J. 211.) A claim for a partition may be filed pending a suit by bill for the same purpose; and if the hearing of the claim take place before the hearing of the other suit, the court will not postpone the claim, but make an order upon it. (*Brace* v. *Foulkes*, 18 L. T. 220.) So where a bill for the administration of an estate was filed, and afterwards a claim for the same purpose, but before the hearing of the claim a decree was taken by consent in the suit by bill, the court refused on the hearing of the claim to make the order asked for, but gave the plaintiff leave to go in under the decree in the other suit, and to apply in case that suit was not properly prosecuted. (*Dicker* v. *Hugo*, 12 Beav. 550.) Where a

power to appoint new trustees in a settlement is vested in husband and wife, and the husband refuses either to concur with the wife in the appointment, or to approve of a person nominated by her, a claim filed by him for the appointment of trustees under the direction of the court will be dismissed with costs. (*Fry* v. *Watson*, 21 L. T. 84.)

If a solicitor files a claim without the plaintiff's authority it will on motion be dismissed, and the solicitor will be ordered to pay the costs of the plaintiffs and defendants, including the costs of the motion as between solicitor and client. (*Crossley* v. *Crowther*, 21 L. J. 565 ; 18 L. T. 181. See also *Wright* v. *Castle*, 3 Mer. 12; *Wiggins* v. *Peppin*, 2 Beav. 403 ; *Allen* v. *Bone*, 4 Beav. 493.) This of course assumes that the court is satisfied of the want of authority. But otherwise, although the claim may be dismissed at the plaintiff's request, it is presumed that upon the authority of *Evans* v. *Kinsey*, 21 L. T. 178, he must himself pay the costs of the motion at least.

The claim to be filed must be printed on writing royal paper, quarto, in pica type, leaded, and interleaved with paper of the same description. (15 & 16 Vict. c. 86, s. 1; 1st G. O., 7th August, 1852 (A).) But trifling alterations in writing before filing, as corrections of names and such matters, are allowed, the claim being still held to be a printed claim within the meaning of the act. (*Yeatman* v. *Moulsey*, 16 Jur. 1004.) The form of the claim is not varied by the new practice, except that it is divided into paragraphs numbered like a bill. In other respects it is, as formerly, in conformity with the form pointed out by the 2nd Order of April, 1850. It must be marked, as required by the 3rd of those Orders, with the name of the equity judge to whose court it is intended to be attached, over which name, if one of the Vice-Chancellors, are to be placed the words "Lord Chancellor." The claim to be filed need not bear the indorsement necessary for the copies intended for service, but it must bear a 5*s*. Chancery stamp. It must

bear the names and address of the solicitor or firm filing it, and of the agent if there be one. If it be not a special claim, but comes within or within the spirit of one of the cases specified in the 1st Order, as construed by the decisions of the court, it may be filed without leave of the court; otherwise, and if within the spirit of the 6th Order (the strict letter is not insisted on), that leave must be obtained on an ex parte application, at which time the original claim intended to be filed must be produced and written on by the registrar. The omission to print counsel's name upon the claim will not prevent its being filed. (*Coppeard* v. *Mayhew*, 22 L. J. 408.) If the claim be by a next friend of an infant, married woman or other party, the person acting as next friend must first sign a written authority to the solicitor for that purpose, which authority is to be filed with the claim. (15 & 16 Vict. c. 86, s. 11.) The authority should be in the form set forth, ante, under "*Proceedings for Plaintiffs by Bill.*"

The effect of filing a printed claim is the same as was that of filing a claim and issuing a writ of summons thereon before the operation of the act. (15 & 16 Vict. c. 86, s. 4.)

SERVICE OF COPY CLAIM.

The writ of summons formerly sued out on the filing of a claim is abolished (15 & 16 Vict. c. 86, s. 2), and instead thereof a printed copy of the claim filed is to be served on the defendant. (15 & 16 Vict. c. 86, s. 3.) This, however, only applies to claims filed on or after the 2nd November, 1852. (13th G. O., 7th August, 1852 (A).) Every copy of a claim to be served must bear a 5*s*. Chancery stamp, and must be previously endorsed as follows, with such variations as circumstances may require. (15 & 16 Vict. c. 86, s. 3.)

Form of Indorsement on Claim.

VICTORIA R.

To the within-named defendant C. D. greeting

We command you, [" and every of you," *where there is more*

than one defendant,] that within eight days after service hereof on you, exclusive of the day of such service, you cause an appearance to be entered for you in our High Court of Chancery to the within claim of the within-named A. B.; and further, that on the fourteenth day after the service hereof, or on the seal or motion day then next following, you do personally or by counsel appear in the court of our Lord Chancellor before the Vice-Chancellor [*naming him*] [*or*, in the court of our Master of the Rolls], at ten of the clock in the forenoon, and then and there show cause if you can why the said A. B. should not have such relief against you as is within claimed, or why such order as shall be just with reference to the claim should not be made. Witness ourself at Westminster the —— day of ——, in the —— year of our reign.

NOTE.—Appearances are to be entered at the Record and Writ Clerks' Office, Chancery Lane, London: and if you neglect to enter your appearance, and either personally or by your counsel to appear in the High Court of Chancery at the place and on the day and hour above mentioned, you will be subject to such order as the court may think fit to make against you in your absence for payment or satisfaction of the said claim, or as the nature and circumstances of the case may require.

On the copies to be served, the indorsement may be either printed or written. Copies for service must also be previously stamped by the record and writ clerk, with a stamp indicating the filing of the claim and the date of such filing. (Ibid.) The service on a defendant is effected in the same manner as a subpœna to appear to and answer a bill was effected at the time of passing the act, with this difference only, that the original claim is not produced. (15 & 16 Vict. c. 86, s. 5.) But there may be substituted service in such manner and cases as the court may think fit to direct. (Ibid.) In *Carwardine* v. *Wishlade*, 15 Jur. 913; 17 L. T. 251, which was a claim for foreclosure, one of the defendants interested in the equity of redemption was travelling in America, but his wife was in England, residing in one house, part of the mortgaged property, and receiving the rent of another. Under the authority of 4 & 5 Will. IV. c. 82, the Vice-Chancellor Knight Bruce ordered service to be substituted on the wife. See also, though not upon claim, *Bankier* v. *Poole*, 3 De Gex & S. 375. The court has also

given leave to serve a defendant to a claim residing out of the jurisdiction with a writ of summons. (*M'Coy* v. *Cross*, 19 L. J. 570; *Thomas* v. *Colsworth*, 14 Beav. 208.) But now, the order is to serve the defendant out of the jurisdiction with a copy of the claim, and for his appearance thereto within such time as the court shall direct, and the copy served must bear an indorsement to the effect of such order. If printed, the indorsement may be altered in writing to accord in point of time with the order of the court. (*Sharpe* v. *Blondeau*, 20 L. T. 154.)

When the defendant keeps out of the way, generally, he will be held to have absconded to avoid being served with process, and an order will be made for substituted service under the 31st General Order of May, 1845. (*The Manchester and Stafford Railway Company* v. *How*, 22 L. J. 1044.)

The ground on which the court orders substituted service is, that there is reasonable expectation that the service will become known to the principal. (*Hope* v. *Hope*, 23 L. T. 182.)

The effect of service of a printed claim, with the proper indorsement and stamp, is the same as was that of service of a writ of summons before the operation of the act, and the plaintiff will be entitled to his remedies accordingly for default of appearance and otherwise. (15 & 16 Vict. c. 86, s. 4.) The defendant, on being served with such copy, will have to enter an appearance to the claim with the record and writ clerk (unless the indorsement be special under an order of the court) within eight days after service, that being the time mentioned in the indorsement; and must show cause, if he can, on the fourteenth day after such service, or on the seal or motion day then next following, why the plaintiff should not have the relief claimed against him or such order should not be made with reference to the claim as should be just. By consent, however, and with leave of the court, cause may be shown on an earlier day. (11th G. O., 22nd

April, 1850.) The defendant must enter an appearance before he can be allowed to show cause. (12th ibid.)

DEFENDANT NOT APPEARING.

If it appears to the court that a defendant is an infant, or a person of weak or unsound mind not found so by inquisition, so that he is unable to defend the suit, the plaintiff may, by virtue of the 28th of the Orders of April, 1850, proceed under the 32nd of the Orders of 8th May, 1845, to have a guardian ad litem appointed for him; but the court must be satisfied of the fact of the disability and that the summons was duly served, and that six days' notice at least was given of the intended application, such notice being given after the time allowed for appearing and being served in the particular mode pointed out by that order. But if the infant has appeared, the court will dispense with an affidavit of service. (*Wood* v. *Logsden*, 22 L. J. 257.) If the defendant, not being under disability, does not appear, and it is considered necessary for an appearance to be entered, it is presumed the Orders of May, 1845, may be rendered available to the plaintiff; but see *Smith* v. *Corles*, 15 Jur. 4; 1 Sim. 259. The plaintiff, however, has ample means of proceeding with his suit without any such powers in reference to appearances as are conferred by those orders, which, in reality, for the purpose of appearance to a claim, may be considered unnecessary. As to this and any other remedy for non-appearance, see infra, under title "*Appearance*."

DELIVERY OF COPIES OF CLAIM.

The delivery of printed copies of a claim for the defendant's use is subject to precisely the same regulations as the delivery of printed copies of a bill, as to which see ante.

AMENDED CLAIM.

A claim may be amended before the hearing, by order of the court, or by order obtained at chambers, or by order of course on motion, or petition at the Rolls. The common

order to amend may be obtained after a claim has been set down for hearing. (*Gwynne* v. *The British Peat, Charcoal and Manure Company*, 17 Beav. 7.) Generally, the application, when not made by motion of course or at the Rolls Office, must be made at chambers, and not in open court. It should not be made at the Rolls Office, nor by motion of course, after affidavits filed, and there should be an allegation that none have been filed. Leave to amend is, however, sometimes given by the court at the hearing, and such leave will be given where it is to rectify a mere slip (*Groves* v. *Lane*, 16 Jur. 854); and sometimes when more important amendments are required. (*Creasor* v. *Robinson*, 18 L. T. 82; 15 Jur. 1049; *Burgess* v. *Sturgis*, 18 L. T. 133.) It was allowed on motion also, where it was discovered that a defendant trustee of a fund in question in the cause had retired before the claim was filed, and that another trustee had been substituted. (*Early* v. *Whitling*, 12 Beav. 549.)

The filing of a claim has the force and effect of the filing of a bill (2nd General Order, 22nd April, 1850), and all claims, writs, caveats, proceedings, directions and orders consequent thereon, are subject to the general rules, orders and practice of the court. (9th ibid.) It would seem, therefore, that the incidents to a bill filed would attach to a claim filed, so far as they are applicable to and consistent with that particular form of suit. Nevertheless, in the case of *Smith* v. *Corles*, 15 Jur. 4, the court refused to allow a claim to be taken pro confesso, or an appearance to be entered for the defendant, who had absconded, and was out of the jurisdiction of the court. But in the case of *Potts* v. *The Thames Haven Dock and Railway Company*, 15 Jur. 762, when an application was made for leave to amend a claim after it had been set down for hearing, the Vice-Chancellor Knight Bruce said, "Let the formalities adopted in the orders for the amendment of bills be observed here, and let the claim be amended."

When a party to a claim dies after it is set down, and before hearing, the proper course is to amend the claim by

substituting the representatives of the deceased party. (*Ainsworth* v. *Alman*, 18 L. T. 83.)

An amended claim need not be signed by counsel, unless the original claim were special, nor then unless special clauses be introduced into the amendments. If the amendments convert it from a common to a special claim, leave must be obtained in open court.

The order to amend obtained at chambers is upon summons. It need not be signed by the judge, the signature of the chief clerk being sufficient authority for the amendment; nor is the application heard by the judge, except in special cases. Before the new practice, it was decided in the case of *Hayward* v. *Price*, 14 Jur. 1083, that a motion for leave to add parties to a claim did not require notice. Such an application made under the present system at chambers may therefore also be made without notice. The order to amend should be served on all parties who have appeared.

The amendments may be introduced into the original printed claim by written alterations, and by additions on the paper interleaved in all those cases where, according to the recent practice, amendments might be made without new engrossments (15 & 16 Vict. c. 86, s. 8; 7th G. O., 7th August, 1852 (A)), that is to say, where they do not in any one part exceed two folios, and can be conveniently interlined or interleaved, in the original claim, otherwise the claim must be reprinted. If this length is exceeded, there must be a reprint, although there may be room to add more on the paper interleaved. (*Stone* v. *Davies*, 1 Eq. Rep. 190; 21 L. T. 190; 17 Jur. 585.) The amendments being made, a copy of the amended claim must be served on the defendant or his solicitor, the 8th section providing that the same practice pointed out by the act for filing, serving and delivering printed copies of original claims shall apply to amended claims, so far as may be; and by the 9th General Order, 7th August, 1852 (A), a copy of any amended claim, whether by reprint or alteration, is to be served upon the defendant or his solicitor, and when the amendment is

not by reprint, the copy served may be partly printed and partly written, but that in every case the copy served must be stamped by the record and writ clerk, as in the case of an original claim. Service on the defendant's solicitor in the cause is good service. (Ibid.) The copies served should bear the same endorsement as the copies of the original claim, but with a different date, indicating the day when they were stamped by the record and writ clerk.

The new practice does not affect claims filed before the 2nd November, 1852, although amended after that time, with regard to engrossing and filing them, and issuing and serving writs of summons, and as to amending claims and issuing and serving writs of summons thereon. (12th and 13th ibid.)

The defendant may, it is presumed, require ten copies of an amended claim, as he may of an original claim, for use throughout the cause, but this does not clearly appear.

The 49th section of the act 15 & 16 Vict. c. 86, provides that the court may, at the hearing of any suit, direct such amendments to be made as may be necessary, in cases where there is a misjoinder of persons as plaintiffs, if it appears to the court, that, notwithstanding a conflict of interest in the co-plaintiffs, or a want of interest in some, or the existence of some ground of defence affecting some or one of them, they or some or one of them are or is entitled to relief. This section of course applies to all suits, whether commenced by bill or claim.

REVIVED CLAIM.

The 21st and 23rd of the General Orders of April, 1850, were framed in order to provide for the revival of a suit instituted by claim, and by virtue of those orders, on such a suit becoming abated or defective for want of parties and no new relief is sought, a claim to revive or carry on the suit might and now may in some cases be filed. But the 52nd section of the act (15 & 16 Vict. c. 86) provides for the revival of suits on their becoming abated by death, marriage or otherwise, or defective by change or transmission of interest or liability, by giving the party prosecuting the suit the

right to obtain, as of course, an order to revive, or an order to the effect of the usual supplemental decree, on an allegation of the abatement or defect, and change or transmission of interest or liability; and such order is to be served on the parties who, according to the recent practice, would have been defendants to a bill of revivor or supplemental bill, and is binding upon them, they thereupon becoming parties to the suit, and being bound to enter appearances as if served with process to appear to a bill of revivor or supplemental bill filed against them. The same section gives such parties liberty to apply by motion or petition to discharge the order so served, on any ground that would have been open to them on a bill of revivor or supplemental bill, within a time to be fixed by general order; and it provides that if any party served be under disability other than coverture, the order shall be of no force or effect against such parties until such time after the appointment of a guardian ad litem as should also be fixed by General Order. The 43rd General Order of 7th August, 1852 (A), fixes the time for parties not under disability, or who are under coverture, at twelve days after service, and the time for parties under disability other than coverture at twelve days after the appointment of their guardians ad litem.

Before there were any decisions on the subject, it was much doubted, and with some reason, whether this 52nd section could be held to apply to claims at all; for although it does not expressly exclude them from its operation, it appears to do so in effect. It is true, it begins by speaking of "any suit in the said court," without stating whether commenced by bill or claim; but then it goes on to say it shall not be necessary to exhibit any bill of revivor or supplemental bill, &c., not referring in any way to claims, at least not doing so in terms. We are therefore relieved of some difficulty by the case of *Martin* v. *Hadlow* (16 Jur. 964; 20 L. T. 59), which expressly extends the practice pointed out by the 52nd section to claims. It is immaterial whether the abatement, defect or transmission of interest occurred before or after the operation of the act. (*Jones* v.

Woods, Cox v. *Taylor*, 20 L. T. 50, and *Lowes* v. *Lowes*, 16 Jur. 968; 20 L. T. 61.) The form of order in the latter case was to revive and carry on the suit against the representative of the deceased defendant.

The motion for this order is not to be mentioned to the court, but the motion paper is to be handed to the registrar as a mere motion of course. (*Bonfil* v. *Purchas*, 16 Jur. 965; *Finch* v. *Southee*, 20 L. T. 244.)

It has been seen that the act requires the defendant to enter an appearance, and decisions are noticed ante, "*Proceedings for Plaintiffs by Bill*," to the effect that an appearance may be entered for a defendant in default; but it has been more recently decided by Vice-Chancellor Wood, after consulting other judges, that an appearance is not necessary, but that the suit stands revived on service of the order, without any appearance, it being the intention of the legislature to give the order to revive under the new practice the same effect which it had under the former practice. (*Ward* v. *Cartwright*, 17 Jur. 781; 22 L. J. 1006.) See other cases, cited ante, "*Proceedings for Plaintiffs by Bill*," pages 92, 93.

An official assignee succeeding a deceased official assignee, a defendant, may be brought before the court under this section. (*Gordon* v. *Jesson*, 22 L. J. 328.)

Although a simple order to revive, and the usual supplemental decree, will be made as of course under the 52nd section, the Vice-Chancellor Turner has refused to make any order beyond that limit; and where a suit had been revived against one of several plaintiffs to the original suit as the defendant to the revived suit, the order not being to the effect merely of the common order to revive or the usual supplemental decree, the court refused an order under the 52nd section, considering that a supplemental claim or bill must be filed. (*Yate* v. *Lighthead*, 16 Jur. 964; 20 L. T. 59; *Dean and Chapter of Ely* v. *Waddelow*, 20 L. T. 256.) And the Vice-Chancellor Stuart, in the case of *Lowes* v. *Lowes* (16 Jur. 991), already cited, refused even the com-

mon order to revive and carry on the suit to a creditor so found by the Master's report which had been confirmed. But the Lords Justices afterwards granted the order, stating that the case, if not within the letter, was within the spirit of the section, and that perhaps the application might have been made ex parte, but not deciding that point. The order may also be obtained where one of a class entitled is born after the institution of the suit. (*Fullerton* v. *Martin*, 1 Drew. 238.)

When it becomes necessary to file a claim to revive, the form pointed out by the General Orders of April, 1850, will be adopted. Under the 21st, 22nd and 23rd Orders, a party claiming simply to revive or carry on proceedings might sue out a writ of summons requiring the defendant to appear to the writ and show cause, if he could, why the proceedings should not be revived or carried on. But, independently of the fact of the writ of summons being now abolished as to claims filed after the 1st of November, 1852, the decisions above cited will render this provision of little use, the act, in effect, superseding its operation. Such also, it is presumed, will be the effect upon the 24th of the same orders, which provided for the entering of caveats at the Record and Writ Clerks' Office against the revival sought for. Where the act can be made to apply, it is not proper to file a claim, or proceed otherwise than as the act directs.

Under 15 & 16 Vict. c. 86, s. 44, the court may either proceed in the absence of any person representing the estate of a deceased person when there is no legal personal representative, or may appoint a person to represent it for all the purposes of the suit or other proceeding. This section has been acted on in the case of *Ex parte Cramer, Re Stewart's Trusts* (20 L. T. 87), and in *Rogers* v. *Jones* (16 Jur. 968; 20 L. T. 50); but the Vice-Chancellor Kindersley held it not to apply to a case where the estate of a deceased person formed the subject of the suit, and required a legal personal representative. (*Groves* v. *Lane*, 16 Jur. 1061.) For other decided cases relative to this section, see ante, pages 135—137.

SUPPLEMENTAL CLAIM.

The practice as to bringing supplemental facts or circumstances before the court in suits instituted by claim does not appear to be altered, still resting on the Orders of April, 1850, the 25th and 26th of which enable the plaintiff seeking any further or supplemental relief to file a supplemental claim precisely as he would an original claim. A supplemental claim may be filed in all cases falling within the scope of the Orders of April, 1850. (*Gray* v. *Rushbridger*, 16 Jur. 682.)

There is no express direction whether a supplemental claim filed after the 1st November, 1852, in continuation of a suit commenced before that time, must be printed or written. It is clear that an amended claim, the original of which was filed before the operation of the act (15 & 16 Vict. c. 86), will be subject to the old practice so far as concerns the engrossing, if necessary to re-engross it. (12th G. O., 7th August, 1852, (A).) As, however, this is the only guide we have on the point, far as it is from our present purpose, and considering the express terms of the 1st section of the act (15 & 16 Vict. c. 86), that the practice of engrossing bills and claims on parchment shall be discontinued, it may be concluded, in the absence of any order or decision on the subject, that any supplemental claim filed after the operation of the act must be printed, although the original claim were filed before that time, and this is the practice adopted.

If the supplemental claim be what is considered special, viz.,—not included in the 1st of the Orders of April, 1850, as liberally construed by the court,—for information as to which, see title "*The Claim*,"—the leave of the court must be obtained to file it as in the case of an original claim.

The 27th of the same Orders assimilates the subsequent proceedings thereon to those upon an original claim, which are already adverted to under other titles.

Leave was given to file a supplemental claim where

errors had been committed in carrying out the proceedings under an original claim. (*Naylor* v. *Robson*, 21 L. J. 280; 19 L. T. 42.) Where in a foreclosure suit by claim the existence of an incumbrance subsequent to that of the plaintiff was found by the Master, and a supplemenal claim was filed bringing the incumbrancer before the court, the court, on the hearing for further directions and on the hearing of the supplemental claim, made a decree for foreclosure (*Robinson* v. *Turner*, 9 Hare, 488); and where an order had been obtained in an ordinary claim for foreclosure, and it afterwards appeared that two of the defendants were still infants, the court declined to allow the claim to be set down for rehearing against the infants, but directed a supplemental claim to be filed against them. (*Scawen* v. *Nicholson*, 17 Jur. 369.)

If the usual supplemental decree, or an order in the nature of it, be all that is required, that may be obtained without a supplemental claim under the 52nd section (15 & 16 Vict. c. 86), as in the case of a bill (see "*Revived Claim*"); but where something beyond that is necessary, or a statement of supplemental facts must be laid before the court, it should be done by supplemental claim.

The representatives of a deceased executor, not parties to an administration claim against the surviving executor, cannot be made parties under the 18th Order of April, 1850, but, if necessary, they must be brought before the court by original or supplemental claim. (*Ewington* v. *Fenn*, 22 L. J. 256.)

EVIDENCE FOR HEARING OF CLAIM.

The recent changes for reforming the practice and proceedings in the Court of Chancery have not yielded a more valuable fruit to the suitors of the court than is to be found in the regulations whereby a plaintiff in a suit by claim is enabled to prove his case at the hearing. Very soon after this form of suit was instituted, the difficulty was felt to press severely on plaintiffs who from adverse circumstances

were compelled to rest their cases on their own evidence, which too frequently proved unavailing, instead of being enabled to compel adverse or unwilling witnesses to reveal the facts which would entitle them to relief. The consequences of this defect were, that suits which otherwise would have been commenced by the expeditious and inexpensive form of claim, were necessarily commenced by bill, under which latter form of suit only a witness could be compelled to come forward and give evidence. This of course inflicted upon the plaintiff great delay, as well as expense, and greatly required a remedy.

Now, however, not only may the court require the production and oral examination in court of any witness or party on the hearing of any suit, whether by bill or claim, the costs of and attending such production and examination to be paid as the court shall direct (15 & 16 Vict. c. 86, s. 39), but under the 40th section, which appears to have been framed chiefly for the purpose of meeting the difficulty complained of, but which goes much further in its operation, any party in any cause or matter may by subpœna ad test. or duces tecum require the attendance of any witness before an examiner of the court, or an examiner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any claim, motion, petition or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used, on any claim, motion, petition, or other proceeding before the court, shall be bound, on being served with such writ, to attend before an examiner for the purpose of being cross-examined; but the court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders or otherwise as may appear necessary to meet the justice of the case. Thus, while the plaintiff is provided with an ample remedy for the evil under which he laboured, being here

supplied with the means of supporting his claim, the defendant is afforded the same means of defending himself, and is not precluded from sifting by cross-examination the witnesses who make affidavits for the plaintiff, nor, we are enabled to add, the witnesses brought forward by him for oral examination; for by the 31st section it is enacted generally, that witnesses examined orally before an examiner shall be subject to cross-examination and re-examination, which shall be conducted, as nearly as may be, in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.

The 38th section of the act 15 & 16 Vict. c. 86, and all the orders of 7th August, 1852, included under the heading "*Evidence*," except the 36th, 37th and 38th, seem to refer to suits by bill only.

It must be borne in mind that every affidavit hereafter to be used in the Court of Chancery is to be divided into paragraphs, every paragraph being numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject. (15 & 16 Vict. c. 86, s. 37.)

By the 36th General Order, 7th August, 1852, (A), one party must give to the other forty-eight hours' notice at least in any cause or matter, on his requiring the attendance of any witness before an examiner for the purpose of his being examined or cross-examined for the purposes of any claim, motion, petition or other proceeding before the court, not being the hearing of a cause, of the intention to examine such witness, and of the time and place of such examination, unless the court dispense with such notice; and by the 37th Order, forty-eight hours' notice must be given to the opposite party by a party intending to cross-examine a witness, whether a party or not to the cause or matter, who has made an affidavit to be used on any claim, motion, petition or other proceeding before the court, not being the hearing of a cause, of the time and place of such intended cross-examination. The 38th Order merely

extends the operation of the preceding orders on evidence to evidence taken in any cause subsequently to the hearing.

The mode in which the oral examination is to be conducted before an examiner for the purposes of a claim, the examiner's powers and duties in case of a witness refusing to be sworn or to sign his deposition, or to answer any lawful question, and in case of demurrers or objections to questions put, and the mode in which the depositions are to be taken down, read over and signed, are respectively the same as are already shown under "*Proceedings for Plaintiffs by Bill*" —"*Evidence for the Hearing.*"

The costs of immaterial or irrelevant depositions are to be dealt with by the court as may be just. (15 & 16 Vict. c. 86, s. 32.)

No commission now issues for the examination of witnesses within the jurisdiction of the court, that proceeding being in effect abolished by the 35th section, which declares it unnecessary, and provides that a commissioner appointed by any order of the court shall have the like power of administering oaths as commissioners had at the passing of the act under commissions issued by the court for the examination of witnesses. Commissions for the examination of witnesses out of the jurisdiction may also be dispensed with. Examinations may now be filed without the oath of messenger. (15 & 16 Vict. c. 86, s. 25.)

In the case of *Johns* v. *Mason* (9 Hare, 28; 20 L. J. 305; 15 Jur. 309; 17 L. T. 118), it is said that a claim, as well as a bill, must sufficiently put the facts in issue, and that the case made by it must be proved secundum allegata et probata, the orders of 22nd April, 1850, not being intended to alter the ordinary rule of the court in that respect. But in *Davies* v. *Griffiths*, 18 L. T. 83, it is held, that in suits by claim the court is not so strict in requiring all facts to be proved according to the rules which govern suits by bill, but will act upon much less satisfactory evidence. In *Jackson* v. *Grant*, 15 Jur. 72, Lord Cranworth, V. C., said, that where there was a conflict of affidavits the

proper course was to file a bill. The same rule was laid down by Vice-Chancellor Knight Bruce. But a plaintiff's affidavit in support of a claim will be received as evidence where there is no opposition or conflict. (*Shardlow* v. *Gaze*, 20 L. J. 395.)

The clerks of records and writs are bound to furnish certified copies of chancery pleadings on application, under the 14th section of the act 14 & 15 Vict. c. 19. (*Reeve* v. *Hodson*, 22 L. J. 696.)

PRODUCTION AND INSPECTION OF DOCUMENTS.

The plaintiff in a suit by claim may call on the defendants to produce on oath the documents in their possession or power relating to the matters in question at any stage of the suit. The 18th section of the act 15 & 16 Vict. c. 86, is that which gives the plaintiff this right, and the 20th section gives to a defendant in a suit by claim a similar right against the plaintiff. As, however, these two sections are considered (ante) in reference to a suit by bill, it is unnecessary to repeat them, or the observations made upon them, except to point out any distinctions between the same proceeding under the two different forms of suit. The application must be supported by some evidence of possession or control and of materiality ; but, upon the construction these sections have received, this is to be furnished by the party required to produce, who may be called on to disclose on oath what he has. If he admits by an affidavit, made by him for the purposes of the claim, that he has in his possession documents relating to the matters in question, the same not being privileged, the court will order him to produce them to the plaintiff, with liberty to take copies or extracts. (*Jefferies* v. *Biggs*, 20 L. J. 638 ; 17 L. T. 162.) But now the application should properly be made at chambers, (see ante, "*Proceedings for Plaintiffs by Bill*," as to course of proceeding,) and, except in special cases, the costs of such an application to the court might be disallowed.

On motion by the plaintiff, in a suit by claim, for the

production of documents, described in the summons, originally attended before the chief clerk in chambers (the application being adjourned to be argued in open court), there being an affidavit by the plaintiff's solicitor that he believed they were in the defendant's possession, but the defendant's affidavits not distinctly admitting the possession, the Vice-Chancellor Stuart refused the order, observing, that the plaintiff should have filed an affidavit with interrogatories, which was the practice now sanctioned, or should have proceeded by bill instead of claim, and obtained an answer making a case for production, and ought not to rely only on his own affidavits and on letters from defendant on the subject of the documents of which he wished to have the production. (*Wing* v. *Harvey*, 17 Jur. 481; 20 L. T. 274.)

After the object of a deposit of documents in the record and writ clerks' office is answered, an order for their delivery out is necessary, but not so when deposited in the master's office. (*Runnall* v. *Yarroll*, 21 L. T. 178.)

See further on this subject generally under "*Proceedings for Plaintiffs by Bill*," where other cases are cited in reference to the course of the court on applications for production.

PAYMENT OF MONEY INTO COURT BY DEFENDANT.

Whenever a defendant to a claim admits by his affidavit that a balance is in his hands in which the plaintiff is interested, the court will, on motion, order him to pay it into court. (*Jefferies* v. *Biggs*, 20 L. J. 638; 17 L. T. 162.) This is, perhaps, but carrying out the principle of the decision in the case of *Cockburn* v. *Green* (20 L. J. 216), where Vice-Chancellor Knight Bruce directed the defendants' affidavits to be treated in all respects as if they were their answers to bills filed against them.

For directions as to the mode of paying money into Court, see "*Accountant-General*," infra.

DEFENDANT'S INTERROGATORIES FOR EXAMINATION OF PLAINTIFF.

The power given to a defendant to examine a plaintiff in a suit by claim, is quite a new feature in the practice of the court. Under the 19th section of the act 15 & 16 Vict. c. 86, a defendant may in any suit, whether by bill or claim, and without a cross bill, file interrogatories for the examination of the plaintiff, to which is to be prefixed a concise statement of the subjects on which a discovery is sought, and deliver a copy thereof to the plaintiff or his solicitor; and the plaintiff is bound to answer as if the same had been contained in a bill of discovery, filed by the defendant against the plaintiff on the day when such interrogatories are filed, and as if the plaintiff had on the same day duly appeared. This section, no doubt, will give a great advantage to a defendant when brought into operation, but that which will most militate against its utility is the delay which it enables a defendant to occasion to a plaintiff. The defendant may resort to interrogatories in any suit which is not commenced by summons, and, according to the expressed terms of the act, there does not appear to be any limit for the filing of such interrogatories, provided they are filed during the suit; but it may be doubted whether the court would so construe the act, and whether it would not limit the right, at all events, to any time before the hearing. In that case, however, it might be on the eve of the hearing, and then, it is presumed, the hearing must be postponed to the coming in of the plaintiff's answer. It is not clear within what time the plaintiff is to answer, but as to this point, see observations relating to a plaintiff's answer in suits by bill. If the plaintiff requires further time to answer the interrogatories, he will take the same course to obtain it as a defendant is required to do in a suit by bill, as to which see "*Plea, Answer, Disclaimer and Demurrer*," ante.

EXCEPTIONS TO PLAINTIFF'S ANSWER.

The plaintiff's answer in a suit by claim, as in a suit by bill, may be excepted to, and there is no difference in practice

between exceptions to a plaintiff's answer and exceptions to a defendant's. The 19th section of the act 15 & 16 Vict. c. 86, provides that the practice with reference to exceptions for insufficiency and scandal shall extend to answers of plaintiffs to defendants' interrogatories; and thereby it is also provided that the court in deciding thereon is to have regard to the statements in the claim, and in the affidavits in support of and in opposition thereto. Exceptions for impertinence are abolished by the 17th section. [See also "*Exceptions to Pleadings*," &c., under "*Proceedings for Plaintiffs by Bill.*"]

SETTING DOWN CLAIM.

A claim is set down for hearing by the registrar's clerk at the order of course seat, upon production to him of the record and writ clerk's certificate of the claim being filed. It is necessary to endorse on the certificate, before the claim can be set down, the name of the solicitor or firm applying to set it down, and underneath "Plaintiff's solicitor," or as the case may be. To this must be added the date of the setting down, and also the day which will be the next motion day either on or immediately after the fourteenth day after service of the claim, on the defendant or the last of the defendants served, if more than one. This is to prevent the claim appearing in the paper for hearing before its proper time.

The endorsement is as follows:—

"A. B." *or* "A. & B." plaintiff's solicitor, *or* "solicitors."
20th day of February, 1854.
Cause to be shown 7th day of March, 1854.
[*i. e.* the seal day.]

But, by consent of the parties, the hearing may take place earlier. Also, without consent, it may be brought on earlier than it otherwise would, though not before the fourteen days have expired, at the instance of either party who may on the certificate of one counsel get it marked in the registrar's book as a short claim. It must, however, for this purpose, strictly bear that character, or it will be again remitted to the general list.

The court will, under circumstances, dispense with the usual certificate of counsel. (*Hargraves* v. *White*, 22 L. J. 640.)

If without consent, a party procures a claim to be marked short, it will be at that party's risk of having to pay costs to the opposite party if the claim should prove not to be a short one. (*Bower* v. *Cunningham*, 17 L. T. 59.) Again, it is decided in *Waldron* v. *Sloper*, 17 L. T. 15 Jur. 187; and *Hills* v. *Treacher*, 15 Jur. 267, that a party setting down a claim as short which is not so, will be ordered to pay the costs of the day. Where a claim at the hearing has been ordered to stand over generally, with liberty to amend, leave of the court must be obtained before it can be again placed in the paper for hearing.

HEARING OF CLAIM.

By consent the hearing of a claim may take place at any time after it is filed (11th G. O., 22nd April, 1850), otherwise it cannot be heard before the fourteenth day after service, or the seal or motion day then next following. The hearing of a claim is brought on by way of motion, but the court takes this class of business on other than motion days. Some branches of the court allot particular days for the hearing of claims, whilst others treat them as causes by bill, leaving them to take their turn in the general cause list. Short claims are of course exceptions to this arrangement, they being put into a list apart from the general causes and heard on days appointed for them. The briefs for the hearing will consist of the claim and the evidence in support of and in opposition to it. The judge should be provided with a copy of the claim at least one clear day before the hearing. This may be handed to the officer of the judge either in court or at the judge's private room. Where this was omitted, the court ordered the cause to be struck out of the paper, and the plaintiff's solicitor personally to pay the costs of the day. (*Somerville* v. *Jamieson*, 20 L. T. 205.) If the defendant do not appear on the hearing, the

court may, under the 13th of the General Orders of 22nd April, 1850, make the order required by the plaintiff on the plaintiff's motion, and reading a certificate of the record and writ clerk of the appearance by the defendant entered in the record office. If the defendant did not appear before the new practice came into operation, the order might have been made on an affidavit of service of the writ of summons, but that process being now abolished as to claims filed since such operation, the affidavit must be of service of a printed copy of the claim duly endorsed and stamped. [See ante, as to endorsement and stamping.]

The following is the form of affidavit of service either of a copy bill or claim, and whether original or amended, where no appearance has been entered by the defendant to the original bill or claim :—

Form of Affidavit of Service of Copy Bill or Claim, whether original or amended, where Defendant has not appeared to the Original.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

I ——, of —— make oath and say as follows :

1. I did on —— the —— day of ——, serve the above-named defendant C. D. with a printed copy of the ["bill of complaint," *or* "amended bill of complaint," "claim," *or* "amended claim,"] filed in this cause, having an endorsement thereon, in the form prescribed by the statute in that case made and provided, by delivering to, and leaving with, the said ["defendant C. D.," *or state what member of the defendant's family, as the case may be*], at his dwelling-house [*or otherwise, as the case may be*], situate at ——, in the county of ——, such printed copy, with such endorsement thereon as aforesaid, which said printed copy was stamped with the proper stamp of the record and writ clerks' office, indicating the filing of such ["bill of complaint," *or, as the case may be*], and the date of the filing thereof, and purported to be a copy of the said ["bill of complaint," *or* "amended bill of complaint," *or* "claim," *or* "amended claim,"] filed in the said office on the —— day of ——, 185—.

Sworn at the Record and Writ Clerks' Office, Chancery Lane, in the county of Middlesex, this —— day of ——, 185—.

If the defendant has appeared to the original, but not

to the amended bill or claim, the following form is applicable:—

Form of Affidavit of Service of Copy of Amended Bill or Claim, where Defendant has appeared to the Original.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

I ——, of ——, make oath and say as follows:

1. I did on —— the —— day of ——, serve [" the above-named defendant C. D.," *or* " Mr. G. H., the solicitor of the above-named defendant C. D. in this cause,"] with a printed copy of the amended [" bill of complaint," *or* "amended claim,"] filed in this cause, having an endorsement thereon in the form prescribed by the statute in that case made and provided, by delivering to and leaving with the [" said defendant C. D.," *or state what other member of the family, as the case may be,*] at his dwelling-house, situate at ——, [*or* " the said Mr. G. H." *or* " a clerk," *or* " a servant" of the said Mr. G. H., at his place of business, *or otherwise, as the case may be,*] situate at ——, in the county of ——, such printed copy with such endorsement thereon as aforesaid, which said printed copy was stamped with the proper stamp of the Record and Writ Clerks' Office, indicating the filing of such [" amended bill," *or* "amended claim,"] and the date of the filing thereof, and purported to be a copy of the said [" amended bill of complaint," *or* " amended claim,"] filed in the said office on the —— day of ——, 185—.

Sworn, &c.

In the absence of the defendant, there must be proper evidence in support of the claim to induce the court to make any order. (15 L. T. 246; 14 Jur. 568, 845.) If the plaintiff does not appear on the hearing the court will dismiss the claim with costs, on production by the defendant, before the rising of the court, of an affidavit of service. (*Rackham* v. *Cooper*, 20 L. J. 394; 17 L. T. 282; 15 Jur. 870.) In the case, however, of *Bell* v. *Hornby*, 14 Beav. 439, the claim was dismissed for non-appearance of the plaintiff, without any affidavit; and it has since been decided, that on such default of the plaintiff every defendant who appears is entitled to have the claim dismissed with costs, without affidavit. (*Charlton* v. *Allen*, 22 L. J. 257.)

On the hearing of a claim the court will hear anything that may be suggested, and the defendant may avail him-

self of the Statute of Limitations without pleading it (*Sneed* v. *Sneed*, 18 L. T. 86; 20 L. J. 630); and if he disclaim at the hearing without any affidavit of the fact, the claim will be dismissed against him. (*Ladbroke* v. *Bleaden*, 16 Jur. 630.) Whether the defendant appears or not, the court may, according to the circumstances, either grant or refuse the order, or make such order as it may think proper; and if it shall think it necessary, may direct any persons or classes of persons to be served or ordered to appear as parties to the claim, or on any proceedings with reference to any accounts or inquiries directed to be made or otherwise. (13th G. O., 22nd April, 1850; and see *Penny* v. *Penny*, 20 L. J. 339; 9 Hare, 39; 15 Jur. 445.) If the plaintiff's title is not disputed, he need not prove it, where the defendant appears; and the court will give liberty to state special circumstances if there be occasion. (*Slade* v. *Robinson*, 15 L. T. 245.) The court refused to disturb settled accounts, the claim not asking for it, but made a decree to administer personal estate pending a suit for that purpose. (*Woodman* v. *Farley*, 14 Jur. 898; 15 L. T. 451.) Where a claim for the administration of an estate was filed by an executor, who had not possessed any assets, the order made was in the prescribed form, without variation on that account. (*Holme* v. *Holme*, 15 Jur. 1004.)

By the 14th of the General Orders referred to, every order made under the 13th General Order is to have the effect of and may be enforced as a decree or decretal order, made in a suit commenced by bill and duly prosecuted to a hearing, according to the course of the court; and the 15th of the same Orders rules that if, upon the application for any such order, or during any proceedings under any such order when made, it shall appear to the court that, for the purposes of justice between the parties, it is necessary or expedient that a bill should be filed, the court may direct or authorize such bill to be filed, subject to such terms, as to costs or otherwise, as may be thought proper.

The hearing of a claim will not be stayed on the ground

that a bill has been filed by other parties in respect of the same, and additional subject matters, if a decree for the same relief must be made in either suit, although the plaintiff in the claim may be entitled to further relief under the decree on the bill. (*Scott* v. *Lord Hastings*, 20 L. J. 530; 17 L. T. 220; 15 Jur. 572.)

The forms of orders to be made on claims are given in schedule (C) to the General Orders just referred to, but these must be modified to conform with the form of order directing accounts or inquiries set forth in schedule (C) to the General Orders, 16th October, 1852, for which see "*Hearing of Cause*," *&c.*, under title "*Proceedings for Plaintiffs by Bill.*"

The court may, on the hearing of any suit, whether by bill or claim, require the production and oral examination in court of any witness or party (15 & 16 Vict. c. 86, s. 39); and may decree relief notwithstanding a misjoinder of plaintiffs, direct amendments, treat plaintiffs as defendants, and at the hearing order a cause to stand revived, in case of the death of the only plaintiff having an interest. (15 & 16 Vict. c. 86, s. 49.) In the case of *Smith* v. *Constant*, 20 L. J. 126; 15 Jur. 97; 16 L. T. 359—496, which was a contested claim, the Vice-Chancellor Knight Bruce at the hearing allowed it to stand over for the plaintiff to adduce further evidence of a fact not admitted by the defendant. That case also decides that the affidavit of the defendant has the same degree of weight as an answer in a cause heard on bill, answer, replication and depositions. So also in *Nowell* v. *Beaumont*, 16 L. T. 359. [See also "*Hearing of Cause*," &c., ante, where may be found observations applicable to the hearing of claims, showing the powers of the court, and other matters connected with that stage of a suit.]

SERVICE OF NOTICE OF DECREE, OR ORDER HAVING THE EFFECT OF A DECREE, AND ITS EFFECT.

To ascertain in what cases such service is necessary, and for directions in reference thereto, see observations under this title, infra.

IV.—Proceedings for Defendants to Claim.

APPEARANCE.

Except in cases originally instituted before the 2nd November, 1852, the writ of summons being abolished (15 & 16 Vict. c. 86, s. 2), the first notice which a defendant to a claim will receive of the suit being commenced against him, unless the court substitutes service, which it may do under the 5th section (15 & 16 Vict. c. 86), will be by service upon him of a printed copy of the claim which has been filed, such copy bearing the endorsement pointed out by the schedule to the act, with such variations as the circumstances may require, and bearing also the stamp of the record and writ clerk indicating the filing of the claim, and the date of such filing. The endorsement will inform the defendant, that he is to cause an appearance to be entered for him at the Record and Writ Clerks' Office within eight days after service upon him of the copy claim, and that on the fourteenth day after service, or on the seal or motion day then next following, he is to appear in court by himself or his counsel, and show cause, if he can, against any order being made upon the claim.

But for the disadvantage of not being heard (12th Order), the Orders of 22nd April, 1850, by which the form of suit by claim was created, do not attach any penalty for not entering the appearance as required, unless it is done by the 9th of those Orders, which declares that all claims and all writs, &c., consequent thereon, are to be deemed proceedings, writs, &c., subject to the general rules, orders, and practice of the court, and by the 10th of the same Orders, which declares that writs of summons are, as to the time and mode of entering appearances thereto, to be subject to the same rules as writs of subpœna to appear to and answer bills. If the effect of these orders be, that for default of appearance within eight days after service of the writ of sum-

mons, an attachment may issue against the defendant, then by the operation of the 4th section of the act 15 & 16 Vict. c. 86, whereby the service of the printed claim endorsed and stamped as required is declared to have the same effect as the service of a writ of summons, an attachment may of course issue for default of appearance within eight days after service of the printed claim. Be this as it may, it is not the practice to issue attachments for non-appearance to claims, and it matters little whether an appearance is entered or not if the defendant does not intend to defend the suit, because, so far as the plaintiff is concerned, he has an ample remedy under the 13th of the Orders referred to, by which he may obtain such order as he may be entitled to on an affidavit of service; and if the defendant desires to defend, he cannot, according to the 12th Order, be heard to do so without having previously appeared.

GUARDIAN AD LITEM.

By the 28th of the Orders of April, 1850, guardians ad litem to defend may be appointed for infants or persons of weak or unsound mind against whom any writ of summons may have issued under those Orders, in like manner as guardians ad litem to answer and defend are appointed in suits on bill filed. The general subject of guardianship ad litem will be found treated on, and the practice shown, ante. If an infant defendant has appeared to a claim, the court will not, on motion by plaintiff to appoint a guardian ad litem, require an affidavit of service. (*Wood* v. *Loysden*, 22 L. J. 257.) The power of a plaintiff to procure the appointment of a guardian ad litem for an infant or person of unsound mind not found so by inquisition is shown, ante, under "*Proceedings for Plaintiffs by Claim.*"

When a defendant is a person of unsound mind, and his relations decline to act as guardians, the solicitor to the Suitors' Fee Fund will, on an application on behalf of the defendant, be appointed his guardian ad litem. (*Palmer* v. *Longland*, 21 L. T. 180.)

PRODUCTION AND INSPECTION OF DOCUMENTS.

A defendant to a claim may apply for production by a plaintiff of any documents in his possession or power relating to the matters in question, which are not protected by the rules of the court, in the same manner as a defendant to a suit by bill [see "*Proceedings for Defendants to Bill*"], there being only the difference that in the case of a claim the defendant has not to wait till he has put in an answer.

EVIDENCE IN OPPOSITION TO CLAIM.

In defending a suit by claim, a defendant will require to know what evidence the plaintiff has to bring forward against him, to obtain copies of which he must have recourse to the regulations set up by the General Orders of 25th October, 1852, for the precise particulars of which reference may be made to Part III., infra, under the title "*Copies of Pleadings and other Proceedings, &c.*" A claim may be opposed by affidavits, and also by evidence of witnesses examined vivâ voce. When a defendant to a claim himself makes an affidavit, he should bear in mind that it will be treated in all respects as if it were his answer to a bill filed against him (*Cockburn* v. *Green*, 20 L. J. 216); and if by any such affidavit he admits a balance to be in his hands in which the plaintiff is interested, the court will, on motion, order him to pay it into court (*Jefferies* v. *Biggs*, 20 L. J. 638; 17 L. T. 162); so also, according to a recent decision of Vice-Chancellor Turner, not reported, may such order be made at the hearing, but not afterwards, except by consent. If the defendant states that he is a creditor to a larger amount than he has in hand, the order to pay in will not be made. (*Silver* v. *Stein*, 1 Drewry, 295.) If by any such affidavit he admits any document to be in his possession of which the plaintiff might upon an answer require the production, the court will order it to be produced, that the plaintiff may inspect and take copies or extracts. (*Jefferies* v. *Biggs*, 20 L. J. 638.) The defendant may employ any of the means provided for the plaintiff to prove his case,

and these are more particularly shown, ante, under "*Proceedings for Plaintiffs by Claim*," "*Evidence for Hearing of Claim*," to which the practitioner is referred, as precisely the same considerations apply to either case so far as the observations there found extend. The defendant has also an advantage given him by the act 15 & 16 Vict. c. 86, which the plaintiff does not possess, namely, to exhibit interrogatories, and this will be placed under the next heading.

DEFENDANT'S INTERROGATORIES FOR EXAMINATION OF PLAINTIFF.

The 19th section of the act 15 & 16 Vict. c. 86, enables a defendant in any suit, whether by bill or claim, and without a cross bill, to file interrogatories for the examination of the plaintiff, to which must be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy thereof to the plaintiff or his solicitor, and the plaintiff shall be bound to answer as if the same had been contained in a bill of discovery filed by the defendant against the plaintiff on the day when such interrogatories shall have been filed, and as if the plaintiff had on the same duly appeared. It could have been wished that this section, important as it is, had been more explicit in its terms. No time is limited for the filing of the interrogatories, and no time is mentioned for delivering a copy to the plaintiff. Neither does it appear whether the defendant may take this step at any moment before the hearing of the claim, nor, if so, whether that hearing is to be in consequence postponed, although even it may have appeared in the paper of the judge. We are led to suppose that this must really be the construction, inconvenient as that practice may appear. These interrogatories will be prepared, settled, signed and filed, and copies served in every respect like those prepared on behalf of a plaintiff for the examination of a defendant in a suit by bill, for which see ante.

The following is a form of affidavit of delivery of interro-

gatories equally available to a plaintiff or defendant by bill or claim.

Form of Affidavit of Delivery of Interrogatories.

In Chancery.

Between A. B. ..... Plaintiff,
and
C. D. ..... Defendant.

I —— of ——, make oath and say as follows:

1. I did on ——, the —— day of ——, deliver to the above-named plaintiff A. B., [*or* "defendant C. D.," *or* "Mr. ——, the solicitor of the above-named plaintiff A. B.," *or* "defendant C. D." in this cause,] a true copy of certain interrogatories filed in this cause, for the examination of the said plaintiff, [*or* "defendant,"] by leaving such copy with the said plaintiff A. B., [*or* "defendant C. D.," *or state what other member of his family, as the case may be,*] at his dwelling-house, [*or* "the said Mr. ——," *or* "the clerk," "*or* servant" of the said Mr. ——, at his office, *or otherwise*], situate at ——, in the county of ——, which said copy was duly stamped with the stamp of the Record and Writ Office, and marked as an office copy, and purported to be a copy of the interrogatories filed in this cause on the —— day of ——, 185—, for the examination of the said plaintiff A. B., [*or* "defendant C. D."]

[*If more than one are interrogated, the conclusion of the form will be,* "such of the interrogatories filed, &c., as the said —— was required to answer."]

Sworn, &c.

PLAINTIFF'S ANSWER.

The answer of the plaintiff to a defendant's interrogatories is the same in general form and otherwise as that of a defendant to a plaintiff's interrogatories in a suit by bill. It must be divided into paragraphs and signed by counsel, and in every respect the same as that of a defendant. [See this title, ante, under "*Proceedings for Plaintiffs by Claim,*" and "*Proceedings for Plaintiffs by Bill,*" where this subject is more fully dealt with.]

EXCEPTIONS TO PLAINTIFF'S ANSWER.

The practice relating to exceptions to a plaintiff's answer is the same as that relating to exceptions to a defendant's answer in a suit by bill, and is regulated by the 13 & 14

Vict. c. 35 (Sir George Turner's Act) and the General Orders of the 2nd November, 1850, framed in pursuance of that act. The 19th section of the act 15 & 16 Vict. c. 86, provides, that the practice, with reference to exceptions for insufficiency and scandal, shall extend to answers of plaintiff to defendant's interrogatories; and it is also provided by the same section that the court, in deciding thereon, is to have regard to the statements in the claim, and in the affidavits in support and in opposition thereto. Exceptions for impertinence are abolished by the 17th section. [See "*Exceptions to Pleadings, &c.,*" under "*Proceedings for Plaintiffs by Bill.*"]

CAVEAT AGAINST REVIVAL OF CLAIM.

In case the plaintiff should proceed under the 21st, 22nd and 23rd of the Orders of April, 1850, to revive or carry on his claim, the proceedings on which have by deaths of parties or otherwise become abated or defective for want of parties, the defendant or proposed defendant, if desirous of showing cause why the proceedings should not be revived or carried on, may under the 24th Order appear and file a caveat against such revivor or carrying on in the Record and Writ Clerks' Office. The form of caveat is given in Schedule (B) to the Orders. He must then give notice in writing to the plaintiff of his having so appeared and filed such caveat. The appearance should be entered within eight days from the day when the defendant is served, and the caveat within eight days from the expiration of such last-mentioned time, otherwise the revivor will take place, and the proceedings may be carried on after that time without order, the record and writ clerk's certificate of no caveat being entered within the time limited being a sufficient authority for the master, or the judge in chambers, or his chief clerk, as the case may be, to proceed. If the caveat be duly entered, the plaintiff must serve a notice of motion on the defendant for the proceedings to be revived and carried on, when, on the defendant bringing forward his objections, the court will

determine the questions between the parties. It is not, however, very probable that the plaintiff will have recourse to the practice pointed out by the foregoing Orders in the face of the recent decisions of the court extending the benefit of the 55nd section of the act 15 & 16 Vict. c. 86, to suits by claim, for which decisions and observations thereon, see "*Revived Claim,*" ante.

SUPPLEMENTAL CLAIM.

The proceedings of a defendant to a supplemental claim are exactly similar to those upon an original claim. The 27th of the Orders of April, 1850, states that a writ of summons may be sued out, and other proceedings may be taken upon a supplemental claim, in like manner as upon an original claim. Although the writ of summons is abolished, the remainder of the order is left operative.

HEARING OF CLAIM.

The defendant, having delivered his brief or briefs, as may be, and which will consist of the claim and the evidence in support, together with his own evidence, but not that of his co-defendants, will at the appointed time attend as upon the hearing of a cause or of a motion, which latter, in fact, it is considered to be. The defendant appearing may possibly successfully resist the object of the suit, but failing to appear, the plaintiff may obtain an order to answer his purpose on such default, if the court thinks proper to grant it, which most frequently it does.

A defendant may avail himself of the Statute of Limitations without pleading it. (*Sneed* v. *Sneed,* 18 L. T. 86; 20 L. J. 630.) Also, if he disclaim at the hearing, without any affidavit of that fact, the claim will be dismissed as against him (*Ladbroke* v. *Bleadon,* 16 Jur. 630), and, it is presumed, with costs, even though the general costs of suit be reserved. (*Jones* v. *Powell,* 13 Beav. 433.)

[See also "*Hearing of Claim,*" under "*Proceedings for Plaintiffs by Claim,*" and "*Hearing of Cause,*" under "*Proceedings for Plaintiffs by Bill,*" ante.]

V.—Proceedings in Suits by Summons.

PARTIES TO A SUIT.

By the 45th section of the act 15 & 16 Vict. c. 86, any specific, pecuniary or residuary legatee, or the next of kin, or some or one of the next of kin of a deceased person, may obtain as of course without bill or claim filed, or any other preliminary proceeding, a summons from either of the chamber judges, requiring the executor or administrator of such deceased person to attend before him to show cause why an order for the administration of the personal estate of the deceased should not be granted, and upon proof by affidavit of due service of such summons, or on the appearance in person, or by his solicitor or counsel, of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such judge shall require, the usual order for administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require, may be made; and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties. In these cases, therefore, it will not be necessary to serve with the summons any of the parties beneficially interested in the estate to be administered.

The 1st rule of the 42nd section also empowers a residuary legatee or next of kin to obtain a decree for the administration of the personal estate of a deceased person without serving the remaining residuary legatees or next of kin. The 2nd rule of that section empowers any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, to obtain a decree for the administration of the estate of a deceased person, without serving any other legatee or person

interested in the proceeds of the estate. By the 3rd rule of the same section, any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

Personal property, the subject of a general power of appointment given to a married woman, who appointed it by will to her executors upon certain trusts, is within the 45th section. (*Ashley* v. *Sewell*, 10 Hare, App., 67; 17 Jur. 269; 21 L. T. 29.)

The 47th section empowers any person claiming to be a creditor of any deceased person, or interested under his will, to obtain in a summary way, in manner thereinbefore provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person, when the whole of such real estate is by devise vested in trustees empowered by the will to sell such real estate and give receipts for the rents and profits and for the produce of the sale. There is not in this section any direction as to the party or parties to be served under it, nor does the reference to the 45th section, comprised in the words "in the manner hereinbefore provided with respect to the personal estate of a deceased person," supply the omission, because that section, referring to personal estate only, requires service on an executor or administrator, neither of whom have any power over real estate, which alone is the subject of the 47th section. Yet it would seem that the 45th is the section referred to, judging from the words "in a summary way." It is presumed that a fair construction of this enactment would be to require service on the trustees, or one of them. But if it refers not to the 45th, but to the 42nd section, it is still less explicit of the intention of the framers.

It is doubtful whether the suit by the heir can be commenced by summons, he not falling within the 45th and 47th sections. Nor is an executor, administrator or trustee, as plaintiff, in express terms, made to fall within either of

those sections, if the word "interested," in the 47th section, means "beneficially interested." By the 9th rule of the 42nd section, in all suits concerning real or personal estate vested in trustees, such trustees represent the persons interested under the trust in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit.

In all the foregoing cases, comprised in the 42nd section, the court may require any other persons to be made parties to the suit.

The 44th and 51st sections appearing to have reference only to proceedings before the court, and the 49th section to suits not commenced by summons when there is but one plaintiff, are not further noticed in this place. But, by the 52nd section, on a suit becoming abated or defective, the persons who would, according to the practice before the operation of the act, have been defendants to a bill of revivor or supplement, shall, on being served with an order to revive, or supplemental order, to be obtained as of course and without any bill of revivor or supplement, thenceforth become parties to the suit.

If, however, a person so served be under any disability other than coverture, the order shall have no effect against that person until after a guardian ad litem has been appointed. (See "*Revival of Suit*," ante.)

THE SUMMONS.

The summons originating an administration suit, under the 45th section of the act 15 & 16 Vict. c. 86, may be in the form following, with such variations as the circumstances of the case may require. (42nd General Order, 7th August, 1852, (A).)

Form of Summons.

In Chancery.

In the matter of the estate of John Thomas, late of the parish of A., in the county of B., deceased.

Joseph Wilson
against
William Jackson.

Upon the application of Joseph Wilson, of Russell Square, in the county of Middlesex, Esq., who claims to be a creditor upon the estate of the above-named John Thomas, let William Jackson, the executor of the said John Thomas, attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex, *or*, at No. —, —— Square, Lincoln's Inn, Middlesex], on ——, the —— day of ——, at —— of the clock in the afternoon, and show cause, if he can, why an order for the administration of the personal [*or* "real and personal"] estate of the said John Thomas, by the High Court of Chancery, should not be granted.

Dated this —— day of ——, 1852.

JOHN ROMILLY, Master of the Rolls, *or*
RICHARD T. KINDERSLEY, Vice-Chancellor, *or*,
JOHN STUART, Vice-Chancellor, *or*,
WILLIAM PAGE WOOD, Vice-Chancellor.

NOTE.—If the above-named William Jackson does not attend either in person or by his solicitor, at the time and place above mentioned, such order will be made in his absence as the judge may think just and expedient.

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named Joseph Wilson.

The summons is to be prepared by the party desiring it to be issued, and is sealed by one of the clerks at the chambers of the judge from whose chambers it is issued. It must bear a 5*s*. Chancery stamp, and a copy being prepared at the same time is to be left at the judge's chambers by such party. (3rd General Order, 16th October, 1852.) A duplicate bearing a 5*s*. Chancery stamp must also, and before service, be filed in the Record and Writ Clerks' Office, and such filing shall have the same effect with respect to lis pendens as the filing of a bill or claim. (4th ibid., and 15 & 16 Vict. c. 86, s. 46.) At the time any summons or appointment is obtained, an entry thereof is to be made in a book, called "The Summons and Appointment Book,"

stating the date on which the summons is issued or appointment made, the name of the cause or matter, and by what party, and shortly for what purpose such summons or appointment is obtained, and at what time returnable. (21st General Order, 16th October, 1852.)

SERVICE OF SUMMONS.

The executor or administrator required to appear must be served with a copy seven clear days before the return (5th G. O., 16th Oct. 1852), and no such service shall be of any validity unless the copy served be stamped with a stamp of the Record and Writ Clerks' Office, indicating the filing of the duplicate. (4th ibid., and 15 & 16 Vict. c. 86, s. 46.) Every copy for service must also bear a 5*s.* Chancery stamp, which must be impressed before that of the record and writ clerk's. (3rd G. O., 23rd Oct. 1852.) At the time of service the original summons must be shown. An affidavit of service in the following form will be required to be produced at the hearing, in case of the non-appearance of the defendant.

Form of Affidavit of Service of Summons originating Proceedings at Chambers.

In Chancery.

In the matter of, &c.
A. B.
against
C. D.

I ——, of ——, make oath and say as follows:

1. I did on ——, the —— day of ——, 185—, serve the above-named defendant C. D. [*or* ——, of, &c.] with a summons in this matter, bearing date the —— day of ——, 185—, issued from and under the seal of the chambers of the Master of the Rolls, [*or* the Vice-Chancellor —— ,] [(*a*) and addressed to the said —— and others,] by delivering to and leaving with the said —— [*or* " with (*state what member of his family*) of the said ——, at his dwelling-house, situate ——,"] a true copy of the said summons, duly stamped with a stamp of the Record and Writ

(*a*) These words to be added in all cases, except administration summonses.

Clerks' Office, indicating the filing of a duplicate of the said summons at the said office, and at the same time showing the said —— the said original summons, so under seal as aforesaid, by which summons the said —— was required to attend at the chambers aforesaid, at ——, on ——, the —— day of ——, 185—, at —— of the clock in the —— noon, and show cause if he could why an order for the administration of the real [*or* " real and personal"] estate of the above-named —— should not be granted [*or in cases other than administration summonses, instead of the words* " and show cause," *&c. as follows:* " on the hearing of an application on the part of ——, for the purpose therein specified."]

2. (*b*) I did on ——, the —— day of ——, also serve the above-named defendant E. F. with the said summons, so under seal as aforesaid, by delivering, &c. [*as above as far as* " so under seal as aforesaid."]

3. There was at the foot of the copy [*or* " each of the copies"] of the said summons so served, and at the foot of the said summons when so produced as aforesaid, a memorandum or statement that such summons was taken out by ——, of ——, solicitor for ——, and a notice that if the said —— did not attend, either in person or by his solicitor, at the time and place mentioned in the said summons (or at the place mentioned in the said summons at the time mentioned in the indorsement thereon), such order would be made, and proceedings taken, as the judge might think just and expedient.

4. (*c*) There was, upon the copy [*or* " each of the copies"] so served, an endorsement, dated the —— day of ——, under the seal of the chambers of the said judge, whereby the —— day of ——, at —— of the clock in the —— noon, was appointed for the parties who had not been served with the said summons to attend at the said chambers.

Sworn, &c.

ADJOURNMENT OF SUMMONS AND NEW SERVICE.

When from any cause the summons may not have been served upon any party seven clear days before the return thereof, an endorsement may be made upon the summons, and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge, and such indorsements are to be sealed at the judge's chambers; and the service of the copy so indorsed

(*b*) If more than one service.
(*c*) This to be added when the time has been extended.

and sealed is to have the same force and effect as the service of an original summons; and where any party has been served before such indorsement, the hearing thereof may upon the return of the summons be adjourned to the new time so appointed. (6th G. O., 16th Oct. 1852.)

It is not necessary again to serve any party already properly served with the original summons, he having the opportunity of attending and witnessing the adjournment.

The 16th of the Orders referred to states, that in all cases where matters in respect of which summonses have been issued are not disposed of upon the return of the summons, the parties are to attend from time to time, without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter.

APPEARANCE OF DEFENDANT.

The 7th of the Orders lastly mentioned requires, that in all cases where proceedings originate in chambers, the parties served shall, before they are heard in chambers, enter appearances in the Record and Writ Office, and give notice thereof. The notice is to the plaintiff only.

EVIDENCE IN SUPPORT OF SUMMONS.

The only kind of evidence contemplated by the act 15 & 16 Vict. c. 86, for use on the hearing of a summons for the administration of an estate, is affidavits, the other provisions in the act for taking oral evidence applying only to cases heard in court; and the 30th section of the act 15 & 16 Vict. c. 80, seeming to apply only to accounts and inquiries directed by the judge to be taken and made by the chief clerk after the hearing. To this, however, may perhaps be added the provisions of the Evidence Act, 14 & 15 Vict. c. 99, s. 2, which, it is presumed, may be had recourse to for the examination of parties when, if ever, necessary.

The evidence required to support the summons will be that required in a creditor's suit, or a suit by a person otherwise

interested in the estate, commenced by claim, which for the most part is the following:—the death of the testator or intestate—that the defendant represents the estate, if the defendant be the executor or administrator—that there is property to administer—and if a creditor's suit, the debt of the party at whose instance the summons issues. If not, then evidence of the interest that party claims in the estate. If there be a will, the material contents of it should be shown, particularly if the summons be under the 47th section of the act 15 & 16 Vict. c. 86, to administer real estate, as in that case the plaintiff must show not only the appointment of the trustees, but that the whole of the real estate is by devise vested in them, and that they are by the will empowered to sell such real estate, and to give receipts for the rents and profits, and for the produce of the sale.

It is open to either party to read affidavits on the return of the summons, but by the 24th Order, 16th October, 1852, notice is required to be given to the other parties concerned, of any such intention. The notice should particularize the affidavits intended to be used. All affidavits used in this court must be divided into paragraphs, every paragraph to be numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject. (15 & 16 Vict. c. 86, s. 37.) If sworn out of the jurisdiction, they may be sworn as pointed out, infra, under title "*Affidavits.*"

HEARING OF SUMMONS ORIGINATING PROCEEDINGS AND ORDER THEREON.

The plaintiff should be prepared, on the hearing of the summons, with an affidavit of due service upon the defendant, as in default of his attendance the judge may, upon such proof being furnished, and upon proof by affidavit of such other matters, if any, as the judge shall require, make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require. (15 & 16 Vict. c. 86, s. 45.) If

the defendant appears either by himself or his solicitor, he may be heard against the summons, and in any case the judge will use his discretion in making or refusing any order thereon, or he may give any special directions touching the carriage or execution of the order; and in case of applications for any such order, by two or more different persons or classes of persons, he may grant the same to such one or more of the claimants, or of the classes of claimants, as he may think fit; and if the judge shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge may direct. (Ibid.) The 7th rule of the 15 & 16 Vict. c. 86, s. 42, also empowers the court to give the conduct of any suit now under consideration to such person as it may think proper, and to require any other person or persons to be made a party or parties; and also to make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

The order made on the hearing of the summons has the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties. (15 & 16 Vict. c. 86, s. 45.) The form of the order, as also of any other order by which accounts are directed to be taken or inquiries to be made, is that set forth in schedule (C) to the General Orders, 16th October, 1852, with such variations as the circumstances of the case may require. [See "*Hearing of the Cause,*" *&c.*, ante.] Each direction is numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number. (8th Order, 16th October, 1852.)

By the 55th of the same orders, parties attending any proceeding in chambers without having obtained the previous leave of the judge to attend the same, are not to be allowed any costs of such attendance, unless by special order of the court; and by the 56th Order, the costs of counsel attending the judge

in chambers are not in any case to be allowed, unless the judge certifies it to be a proper case for counsel to attend. [See also generally "*Hearing of Cause,*" *&c.* ante, where may be found observations in some respects applicable to suits commenced by summons.]

SERVICE OF NOTICE OF DECREE, OR ORDER HAVING THE EFFECT OF A DECREE, AND ITS EFFECT.

For the cases in which such service is necessary and directions in reference thereto, see infra, under this title.

REVIVOR AND SUPPLEMENT.

It is to be regretted that neither the acts nor the orders afford a very clear notion as to the mode in which it is intended that suits commenced by summons shall be revived when abated, or by what means supplemental parties are to be introduced into the proceedings, or other defects remedied in case of death or other circumstance rendering some such proceeding necessary. In the case of a bill, and also of a claim, we may, according to the recent decisions, proceed under the 52nd section of the act 15 & 16 Vict. c. 86, and take an order of course upon an allegation of the abatement or defect and change or transmission of interest or liability, and serve it upon the parties who would have been defendants to a supplemental bill or bill of revivor, or to a supplemental claim or claim to revive. Probably, in the liberal spirit in which this section has already been construed, it may be held also to extend to suits originated by summons, especially as the opening words of the section are "Upon any suit in the said court becoming abated," &c. If not, there does not seem to be any mode pointed out for reviving or continuing suits so instituted, unless recourse be had to the 44th section, which, however, only provides for cases where there are no representatives. But even if these sections are held to apply to all suits, yet, seeing that by the decisions of the court on the subject, the former section can-

not be extended to cases where aught but the mere revival and carrying on of the suit, or an order to the effect of the usual supplemental decree is required, and that the latter section does not apply to cases where the estate to be represented forms the subject of the suit; in those cases where more than the common order or decree is necessary, or where the estate to be represented does form the subject of the suit, the plaintiff, under this form of suit, is left without a means of proceeding to effect his object, unless he be permitted to commence de novo by taking out a fresh summons, though it be after decree. It is, however, obvious that this course would lead to serious inconvenience and loss.

PART II.

PROCEEDINGS AFTER DECREE, OR ORDER HAVING THE EFFECT OF A DECREE.

SERVICE OF NOTICE OF DECREE, OR ORDER HAVING THE EFFECT OF A DECREE, AND ITS EFFECT.

THIS service is frequently necessary in administration suits, and suits instituted for the execution of trusts, suits for the protection of property pending litigation, and cases in the nature of waste. The practice is originated by the 42nd section of the 15 & 16 Vict. c. 86. In all such cases, where an administration decree may be obtained by one residuary legatee or next of kin, without serving the remaining residuary legatees or next of kin—by one legatee without serving any other legatee or person interested in the proceeds of the estate—by one residuary devisee or heir without serving any co-residuary devisee or co-heir—by one executor, administrator or trustee against any one legatee, next of kin or cestui que trust—or where a decree for the execution of trusts may be had by any one of several cestuis que trusts without serving any other of them—or by one executor, administrator or trustee against any one legatee, next of kin or cestui que trust—or where in suits for the protection of property pending litigation, and in cases in the nature of waste, one person sues on behalf of himself and all other persons having the same interest—it is required that notice of the decree obtained be served on all persons, who, according to the practice of the court before the operation of the act, would have been necessary parties to any such suit.

It was decided, that an infant defendant must be served

under this section (*Clarke* v. *Clarke*, 20 L. T. 88); and all persons interested. (*Doody* v. *Higgins*, 9 Hare, App., 32.) But by the more recent General Order, the 5th of the 1st June, 1854, it is provided, that, in all cases in which any person required to be served with notice of a decree or order pursuant to the eighth rule of the 42nd section of the act 15 & 16 Vict. c. 86, may be an infant, or a person of unsound mind not found so by inquisition, the notice is to be served upon such person or persons, and in such manner as the judge to whose court the cause is attached may direct.

Guardians ad litem appointed for infants, or persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, are to be appointed in like manner as guardians ad litem to answer and defend are now appointed in suits on bills filed. (6th G. O., 1st June, 1854.)

At any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian ad litem to be appointed for any infant, or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order. (7th ibid.)

When some of the persons are out of the jurisdiction it is necessary to serve them with notice of the decree; and, if necessary, an enlarged time may be given them to apply to vary or add to the decree. (*Strong* v. *Moore*, 22 L. J. 917.) See also *Chalmers* v. *Laurie*, 10 Hare, App., 16.

As to suits originated by summons, it will be safe to conclude in the construction of the 42nd section of the act 15 & 16 Vict. c. 86, that in all cases coming within the 45th and 47th sections, or, in other words, in all cases where an order having the effect of a decree may be obtained in a suit commenced by summons, notice of the decree or order must be served upon all persons who, according to the recent practice of the court, would have been necessary parties to the suit. This is required to be done in all the cases mentioned in the 42nd section, from rule 1 to 6 inclusive, and those

cases would seem to include the cases which would come within the 45th and 47th sections, viz., creditors ; specific, pecuniary, and residuary legatees ; next of kin ; and persons interested under a testator's will. The only doubt, perhaps, that could arise would be, whether suits in which creditors are plaintiffs are so included ; but these, though not specifically named, may be included in rule 5, which speaks of all cases of suits for the protection of property pending litigation. What, however, strengthens the conclusion that creditors come within the regulation as to notice is, that it is difficult to see why they should form an exception.

It is by the section just referred to also provided, that after such notice the persons served shall be bound by the proceedings in the same manner as if they had been originally made parties, and that they may by an order of course have liberty to attend the proceedings under the decree, and that any party so served may apply to the court to add to the decree.

The 8th General Order, 1st June, 1854, provides, that, in all cases in which notice of a decree or order shall be served pursuant to the eighth rule of the 42nd section of the act of 15 & 16 Vict. c. 86, the notice so served is to be entitled in the cause, and there is to be endorsed thereon a memorandum in the form or to the effect following, that is to say :—

Take notice, that, from the time of the service of this notice, you [*or, as the case may be,* the infant, *or* person of unsound mind] will be bound by the proceedings in the above cause in the same manner as if you [*or,* the said infant, *or,* person of unsound mind] had been originally made a party to the suit, and that you [*or,* the said infant, *or,* person of unsound mind] may, by an order of course, have liberty to attend the proceedings under the within-mentioned decree or order. And that you [*or,* the said infant, *or,* person of unsound mind] may, within one month after the service of this notice, apply to the court to add to the decree or order.

A person not a party to the suit, but being served with notice of the decree with a view to bind him in subsequent proceedings may, if he feels aggrieved by the decree, move

on notice for leave to file a bill in the nature of a bill of review. (*Kidd* v. *Cheyne*, 18 Jur. 348; 23 L. T. 20.)

The 40th General Order of 7th August, 1852, (A), limits the time for making this application to add to the decree to one month after service of the notice.

After service of notice of the decree, a memorandum of the service must be entered in the Record and Writs Clerks' Office, which will be done on production by or on behalf of the plaintiff of an affidavit of such service. (41st G. O., of 7th Aug. 1852, (A).) The following is a form of such affidavit:—

Form of Affidavit of Service of Decree or Order, or Notice of Decree or Order, under 15 & 16 Vict. c. 86, s. 42.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

Or—In the matter of, &c. [*as the case may be*].

I ——, of ——, make oath and say as follows:

1. I did on ——, the —— day of ——, serve E. F., one of the children of ——, the testator named in the plaintiff's bill [*or*, "claim"], filed in this cause [*or*, "the above-named ——, deceased"], with a notice in writing, in the words and to the effect following—that is to say [*set out the notice*] (*or, if a copy of the decree or order is served, the original may be referred to as an exhibit, as follows*—The decree [*or* "order"] now produced and shown to me, marked 'L.,' *or the copy may be set out in the affidavit as a true copy of the decree or order*), by delivering such notice [*or* "copy"] to and leaving the same with the said E. F., [*or* "by delivering to and leaving with the said E. F. a true copy of the said decree, *or* order"], at the residence of the said E. F. (*or, as the case may be*), situate at ——, in the county of ——.

Sworn, &c.

[If the parties are infants, or under disability, service should also be effected on the guardians, committees or persons with whom they reside.]

The following form must be filled up, and handed to the Record and Writ Clerk, to enable him to enter a memorandum of service of notice of decree or order.

In Chancery.

A. *v.* B.

Memorandam of the service of notice of the decree [*or* "order"]

made in this cause, by the Master of the Rolls [*or*, "Vice-Chancellor ——,"] dated the —— day of ——, 1853, to be entered under Order 41 of the Rules of 7th August, 1852.

Date when served.	Names of Parties.	Residence.	Proof of Service by Affidavit of
1853, June 10	William Smith	14, Cheapside, in the city of London	Edward Wilkins, filed 9th June, 1853.
,, ,, 11	Edward Barnes	Lyme Regis in the county of Dorset	,, ,, ,, ,,

This form being taken to the record and writ clerk, together with the office copy of the affidavit of service, the memorandum will be entered.

In a case not reported, notice of a decree was served before the decree was drawn up, but some addition being made to it by consent in the registrar's office, simply in reference to the costs of a party entitled to costs, it followed that as to that addition no notice had been given. The record and writ clerk refused to enter a memorandum of the service, and was supported in his refusal by the Vice-Chancellor Wood at chambers, his Honor holding that the notice must be of the whole material part of the decree, and that as the addition as to costs might affect the parties served, a new service was necessary.

As to the service of a copy of a decree against a party in custody, or out of the realm, or absconding at the time it was pronounced, and returning to this realm or dying before returning or appearing openly, or dying in custody within seven years before service, see 1 Will. IV. c. 36, ss. 4 & 5.

For the service required of orders or decrees, the performance of which it is intended to enforce, and for the indorsement required in such cases, see 11th & 12th General Orders, 11th April, 1842. A writ of execution is no longer necessary. (10th ibid.).

ENROLMENT OF DECREE, ORDER OR DISMISSION.

Either party to a suit obtaining a decree or order or dis-

mission in his favour, should, if he desires to preclude his opponent from appealing therefrom to the Lord Chancellor or having the case reheard, proceed to enrol it. The effect of this step is either to send the party requiring the rehearing to the House of Lords or to compel him to file a bill of review. Formerly, to effect an enrolment, application was made to the clerk in court of the party desiring it; but after the abolition of the Six Clerks' Office, the 3rd of the General Orders of 26th October, 1842, provided for the performance of this duty by the clerks of records and writs, to whom application must now be made for such purpose.

The solicitor prepares the docket on brief paper, and hands it to the record and writ clerk for approval, who will also obtain the signature of the Lord Chancellor to it. When signed, there cannot be a rehearing or appeal to the Lord Chancellor, though the remaining forms are not complete. (*Mann* v. *Ricketts*, 14 L. J. 255; 9 Jur. 543.) The enrolment is then engrossed on parchment, to be procured at the Rolls Chapel Office, and both are handed to the record and writ clerk, who deposits them in the Rolls Chapel.

The General Order of 17th March, 1843, provides—

First, that for the purpose of diminishing expense in the enrolment of decrees and orders, no part of the statements or allegations contained in any bill, answer, petition, affidavit or report, shall be recited or stated in any such enrolment; but that it shall be sufficient to state in such enrolment the filing of the bill or petition, or service of the notice of motion, with the names of the parties thereto, together with the prayer of the bill or petition, or notice of motion, the filing of the several answers, and other pleadings or proceedings and reports, whether confirmed or not, and the short purport or effect of any decree or order made, had, put in or taken before the date of the decree or order enrolled and leading thereto.

Second, that no decree or order shall be enrolled until the clerk of records and writs, in whose division the cause or matter may be, shall have inspected the docket of such en-

rolment, and shall have certified thereon that the statement of the pleadings, orders, reports and proceedings therein contained is correct; and that for such inspection and certificate, the clerk of records and writs shall be entitled to receive, and he is hereby authorized to receive, the sum of five pounds, to be by him paid into the Suitors' Fee Fund.

But by the General Order, 25th October, 1852, the fee for examining and signing an enrolment is fixed at 3*l.*

To prevent an enrolment, a caveat is entered with the record and writ clerk, on payment of a chancery stamp of 5*s.*

The caveat prevents the enrolment for twenty-eight days after the docket of the decree, order or dismission is left for signature, as will be seen post.

The time for enrolling a decree, order or dismission is now limited by one set of the General Orders of the 7th August, 1852 (B), there having been two sets issued together and bearing the same date. By those Orders it is required that the enrolment be within six calendar months after the decree, order or dismission is pronounced, except by special leave of the court. (Order 2.) After that time there must be an order for the purpose, which, unless by consent of the adverse party, or on motion and notice to all parties, shall be a conditional order in the first instance, but shall become absolute without further order, unless cause is shown against it, within twenty-eight days after service. (Order 3.) If a caveat be entered it must now be prosecuted with effect within twenty-eight days after the docket of the decree, order or dismission is left to be signed with the proper officer, otherwise it will be of no force, and the docket may after the expiration of that time be presented to be signed as if no caveat had been entered. (Order 4.) After five years from the date of a decree, order or dismission, an enrolment will not be allowed. (Order 5.) But the time may be enlarged by the Lord Chancellor, either sitting alone or with the Lords Justices, when it shall appear to him, under the pecu-

liar circumstances of the case, to be just and expedient. (Order 6.)

The Vice-Chancellors have jurisdiction to order enrolment. (*Butchardt* v. *Dresser*, 22 L. T. 302.)

An enrolment may be vacated by the court under proper circumstances, in order to let in a petition of appeal or rehearing. For such purpose, application should be made to the Lord Chancellor, sitting either alone or with one or both of the Lords Justices, for leave to give notice of motion to vacate the enrolment. (*Cooper* v. *Taylor*, 23 L. T. 263.)

APPEAL AND REHEARING.

To appeal from an order made on motion, a notice of motion, by way of appeal, will suffice, but in other cases a petition of appeal is necessary, and at foot thereof a certificate signed by two counsel, that they conceive it to be a proper case to be reheard. The petition is drawn by counsel.

The 50th General Order, August, 1841, provides, that in any petition of rehearing of any decree or order made by any judge of the court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard.

The petition is presented in the same manner as other special petitions at the Lord Chancellor's secretary's office, and is presented in duplicate. The Court of Appeal must be furnished with a copy of the decree or order appealed from. The answer to the petition required formerly the petitioner or his clerk in court to sign the petition, consenting to pay such costs as the court may award; but now the solicitor is, by the 16th General Order, October, 1842, substituted for the clerk in court. On this being done, and the deposit of 20*l.* paid within the time limited, the appeal is set down by the registrar's clerk. The order to set it down must, when passed and entered, be served on all parties.

Orders of course and ex parte orders are discharged on motion generally to the judge to whose court the cause or matter is attached.

When the Lords Justices differ and pronounce judgment, the decision below is affirmed, and in such case a rehearing before the full court will not in general be directed. (*Blann* v. *Bell*, 2 De G. M. & G. 775; 16 Jur. 1103; 22 L. J. 236.)

A second rehearing was granted where there was manifest error in the decree (*Fuller* v. *Willis*, 11 Jur. 233); but there cannot be a second appeal to the Lord Chancellor without leave first given. (*Byfield* v. *Provis*, 3 My. & Cr. 437; *Toulmin* v. *Copland*, 8 Jur. 1161.)

Under ordinary circumstances, the decree or order appealed from must be passed and entered before the appeal can be entertained. (*Taylor* v. *Popham*, 15 Ves. 72.) But in pressing cases the court allows immediate appeals.

The General Orders of 7th August, 1852, (B), introduces a highly important alteration in the rule of this court respecting the time within which an appeal or rehearing may be had. By the 1st of those Orders, which take effect on and from the 28th October, 1852, no appeal from any decree, order or dismission, or any rehearing, shall be allowed unless the same is set down for hearing, and the requisite notice thereof duly served, within five years from the date of any such decree, order or dismission respectively. But by the 6th of the same Orders the Lord Chancellor may enlarge the period, where it shall appear to him under the peculiar circumstances of the case to be just and expedient.

These orders will, in some measure, assimilate the practice of this court on appeals to that of the House of Lords, so far as time for preferring them is concerned, although in the case of an appeal to the Lords the time runs from the enrolment, whilst in the case of an appeal to the Lord Chancellor it runs from the date of the decree, order or dismission.

The application to enlarge the period under the 6th Order is to be made by petition, and not by motion. (*Storrs* v. *Benbow*, 20 L. T. 230.) The court will not enlarge the period for a rehearing or an appeal, except under very special circumstances. (*Townley* v. *Deare*, *Mayhew* v. *Fitch*, 21 L. T.

233.) But where the other side had lodged a petition of appeal within the period, the full court granted the application. (*Cookson* v. *Lee*, 21 L. T. 258.) The reduction of time allowed to the suitor in the cases of appeals and rehearings in this court is enormous, when it is considered that appeals and rehearings have been allowed, although from twenty to thirty years have elapsed between the date of the decree or order complained of and the petition of appeal or rehearing. But a petition presented in 1851, to rehear a cause disposed of in 1834, was dismissed with costs. (*Townley* v. *Bedwell*, 15 Beav. 78.)

The appeal is set down for hearing before the Lords Justices appointed by virtue of the 14 & 15 Vict. c. 83. But see the General Order, 10th March, 1852, as to decisions of Sir L. J. Knight Bruce and Lord Cranworth, when Vice-Chancellor, and which, from the now altered position of the latter of those judges, may be held inapplicable, if indeed it is not now wholly disregarded, as to both those judges' decisions.

If it is considered by that court or by the Lord Chancellor advisable that it should be heard before the full court of three, which includes the Lord Chancellor, his lordship will arrange accordingly, and the appeal will be transferred. The respondents obtain copies of the appeal from the registrar on payment of 1*l.* for each copy.

Although this court is empowered by the above act to require the attendance of a common law judge to assist in any particular case, the court will not call in such assistance unless it entertains very great doubt. (*Heward* v. *Wheatley*, 22 L. J. 435; 17 Jur. 403.)

If a decree or order is made by consent, it cannot afterwards be set aside either on appeal or rehearing, but there may be a remedy against the counsel if he consents without authority. (*Bradish* v. *Gee*, 1 Amb. 229.) If there be fraud in obtaining such decree or order, an original bill may be filed. (Ibid.)

Under the 15 & 16 Vict. c. 86, s. 39, the Court of Appeal has power to require the production and oral examination before itself of a party, not orally examined before the court below. (*Hope* v. *Threlfall*, 22 L. T. 341.) But where the defendant had tendered himself in the court below for examination, to enable the plaintiff to cross-examine him, and the plaintiff had refused the offer, the full Court of Appeal held that to be sufficient reason for refusing the plaintiff's application to have that course adopted upon the appeal. (*Hudson* v. *Wetherell*, 18 Jur. 499; 23 L. T. 149.)

When an appeal to the Lord Chancellor has been fully heard by him before delivering up the great seal, and is standing for judgment, he may within six weeks after such delivery give out to the registrar a written judgment signed by him, and a decree or order shall be drawn up pursuant to such judgment, and shall have the same force and effect as if the judgment had been given in open court the day before the delivery up of the great seal. (15 & 16 Vict. c. 80, s. 60.)

If a person, not being a party to a suit, desires to have it reheard, he must first obtain permission to present a petition of rehearing. (*Gwynne* v. *Edwards*, 9 Beav. 22; 15 L. J. 84; *Paterson* v. *Scott*, 1 De G., M. & G. 533; *Berry* v. *Attorney-General*, 2 Mac. & Gord. 16.) But quære, whether such an application can be made ex parte. (*Coldwell* v. *Holme*, 21 L. T. 258.) The Court of Appeal having reversed the order of the court below, and the order of reversal being still in minutes, the court acceded to a motion for rehearing, upon a representation by counsel for the respondents that material considerations had not been brought before the court, and that although twenty-one days had elapsed. (*In re Crossthwaite, a Bankrupt, Ex parte Turner*, 2 De G., M. & G. 927.)

An appeal to the House of Lords cannot be sustained as of right by a person improperly made a party to a suit in the court below (*Rochfort*, app., *Battersby*, resp., 2 House

of Lords Cases, 388); nor at all until the decree or order appealed from is enrolled. (*Andrews* v. *Walton*, 8 Cl. & F. 457; *Broadhurst* v. *Tunnicliff*, 9 ibid. 71.)

The House of Lords will reverse its own order made upon a misrepresentation, though the representation be inadvertent, the order reversed having itself reversed a decision of the Court of Chancery in Ireland, and being made behind the back of interested parties, and enabling a fraud to be committed by the party presenting the petition on parties who were not present at the making of the order. (*Tommey* v. *White*, 5 Ir. Jur. 321.)

A judgment of the House of Lords on appeal from this court may, on motion, be made an order of this court, notwithstanding that the decree appealed from was made by the predecessor of the presiding judge; and when made an order of court, the costs ordered to be paid by the judgment of the house, and certified by the officer of the house, will be ordered to be paid upon motion, on notice, without interest or the costs of the application; but the court refused upon an ex parte application to direct a writ of fieri facias to issue. (*Man* v. *Ricketts*, 3 De G. & S. 446.) Upon a rehearing, an error in an order of a late Lord Chancellor may be rectified by a present Lord Chancellor. (*Att.-Gen.* v. *Corporation of Exeter*, 18 L. T. 202.) So is there jurisdiction in the Court of Appeal under the statute 14 & 15 Vict. c. 83, to correct an error in an order of the Lord Chancellor. (Ibid. 22 L. J. 418.) The fact of an appeal being to the same judge who decided the case in the court below is no reason for transferring the cause. (*Re London and Birmingham Extension and Northampton Railway Company*, 18 L. T. 215.)

The Lord Chancellor may alter or add to a decree, although it has been appealed to the House of Lords, if the variation or addition does not touch or affect the part appealed from. (*Birch* v. *Joy*, 3 H. of L. 566.)

When an order of the Lord Chancellor gives relief inconsistent with an order already made by the court below, it

has the effect of nullifying such previous order. (*Dawson* v. *Joy*, 23 L. T. 239.)

On an appeal to the Lord Chancellor from an order made on the hearing of a claim, the same rules as to opening the case and replying are observed as upon an appeal from a decree made in a suit by bill, notwithstanding that the rehearing is by way of motion under the 30th G. O. of 22nd April, 1850 (*Sims* v. *Helling*, 21 L. J. 387; 19 L. T. 224; 16 Jur. 899); and all appeal motions from orders made on the hearing of claims and motions for decrees, and special cases are to be set down with the appeals, and not with the appeal motions, and the solicitors are at the time of setting down such appeals on claims and motions for decrees to produce at the order of course seat the notice of motion, which must state that it is an appeal from an order of the Master of the Rolls, or one of the Vice-Chancellors, made on a claim or motion for decree. (Regulation, 29th Oct. 1853.) No deposit is payable on these appeals, there not being any petition of appeal.

When a party desires to appeal from a certificate of the chief clerk that has been confirmed by the judge in chambers, the proper course is to apply in open court for an order pro formâ in conformity with the decision in chambers, and against that order an appeal will lie. (*Briggs* v. *Wilson*, 2 Eq. Rep. 153; see also *Rhodes* v. *Ibbetson*, 2 Eq. Rep. 76.)

Where objections to the certificate of a chief clerk have been argued before the judge in chambers, no rehearing in open court will be allowed, except under special circumstances; but it is at the option of the dissatisfied party in the first instance to have them argued either in chambers or in open court; and when a party wishes to appeal from the certificate after it has been confirmed by the judge in chambers, he must make an application in open court, when the judge will make an order *pro formâ* in conformity with the decision in chambers, against which the party can appeal. (*The York and North Midland Railway Company* v. *Hudson*, 17 Jur. 1090; 22 L. T. 151.)

By the 42nd General Order, 3rd April, 1828, it is provided, that the deposit upon every petition of appeal or rehearing be increased to twenty pounds, to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with any further taxed costs occasioned by the appeal or rehearing, unless the court shall otherwise order.

By the 41st section of the 15 & 16 Vict. c. 87, the deposit then payable on setting down appeals and exceptions for hearing shall continue to be payable, and such deposits shall be paid to and received by the senior registrar of the Court of Chancery for the time being, who shall once in every three months pay all sums so received by him into the Bank of England to the credit of the accountant-general of the said court (the amount so received and paid by such registrar to be verified by affidavit), and the several sums when so paid in shall be from time to time placed to an account to be entitled "The Appeal Deposit Account," and the monies which shall from time to time be standing to such account shall be paid and applied as the Court of Chancery shall from time to time in that behalf order or direct.

By the General Order of the 10th December, 1852, the balance of cash in the hands of the registrars of the Court of Chancery arising from deposits on appeals, rehearings and exceptions, made previous to the passing of the act 15 & 16 Vict. c. 87, are to be ascertained, and the amount, verified by affidavit, to be paid into the Bank to the credit of the accountant-general of the said court, to the account to be entitled "The Appeal Deposit Account." The senior registrar for the time being is to set down the deposits received by him under the said act in a book to be kept by him for that purpose, together with a memorandum of the name of the cause or matter on which each deposit is made, and of the party making the same, and of his solicitor. And in any case where the said court has heretofore by any order directed, or shall hereafter direct, any such deposit, or portion of deposit, to be paid, the same is to be paid by the

accountant-general of the said court out of any sum of cash, which, at the time of such payment, may be in the Bank to his credit, in the account entitled "The Appeal Deposit Account," to the party or parties to whom such deposit or portion of deposit is ordered to be paid, or to his or their solicitor to be named in such order, whose receipt in such latter case is to be a sufficient discharge for the same. And for the purpose of such payments, the accountant-general is from time to time to draw on the Bank according to the form prescribed by the act of parliament and the general rules and orders of the court in that case made and provided, without such direction being contained in each particular order.

The briefs on the appeal are those used in the court below, with additional fees, and with copies of the decree or order appealed from, and the petition of appeal.

The appellant should have in court an office copy of an affidavit of service of the order to set down the appeal.

Upon an appeal from part of a decree, although the whole case is open for the respondents as between them and the appellant, such is not the case as between co-respondents. (*Lord Brooke* v. *Earl of Warwick*, 13 Jur. 547.)

When the appeal is from the whole decree, the plaintiff's counsel begins, but otherwise if from part only. If from the whole decree, except so much as relates to costs, it is treated as an appeal from the whole decree, and the plaintiff has a right to begin. (*Senhouse* v. *Hall*, 2 Eq. Rep. 483.)

The costs of a rehearing or appeal are not carried by the words "costs of suit as between solicitor and client." To provide for such costs, they must be specially mentioned. (*Agabeg* v. *Hartwell*, 5 Beav. 271.)

If there be an examination vivâ voce upon an appeal of witnesses whose evidence was not before the court below, and the appeal is successful, the appellant is entitled to the costs of the appeal. (*Langford* v. *May*, 22 L. J. 978.)

And where other defences besides the Statute of Frauds, which were successful below, failed on appeal, it was held

that the defendants must pay the costs of a vivâ voce examination rendered necessary by those defences before the appeal court, the examination taking the place of an issue. (*Martin* v. *Pycroft*, 2 De G., M. & G. 785; 16 Jur. 1125; 22 L. J. 94.)

As to rehearing a cause after a decree made upon bill taken *pro confesso*, pronounced whilst defendant was out of the realm or absconding, see 1 Will. 4, c. 36, ss. 6, 7 and 8. But this provision can hardly apply now, and certainly not in the cases referred to in the 83rd General Order, May, 1845, or where the decree is made absolute under the 90th, 91st and 92nd of these Orders.

Where the defendant waives all objection to the order to take the bill pro confesso, see 89th General Order, May, 1845, as to rehearing.

ENFORCING DECREE OR ORDER.

When the act required is *the execution of a deed or other instrument, or the surrender or transfer of property, or the levying of a fine or suffering a recovery*, and the person refusing or neglecting to do so is committed for the contempt, or charged with or detained under process for such contempt, and shall remain in prison, the court may, upon motion or petition, and upon affidavit that such person has, after the expiration of two calendar months from the time of his being committed under or charged with, or detained under such process, again refused to execute such deed or instrument, or make such surrender or transfer, or levy or transfer such fine or recovery, order or appoint one of the Masters in ordinary, or, if the act is to be done out of London, then, if necessary, one of the Masters extraordinary, to perform such act for and in the name of such person, and to do all acts necessary to give validity to such fine or recovery in his name, and to lead or declare the uses thereof; and the same is to have the same force and validity as if done by the plaintiff himself, and within ten days afterwards notice is to be given by the adverse solicitor to the party in whose name

the same is executed or made, and such party, as soon as the act is done, is to be considered as having cleared his contempt, except as to the costs of contempt, and shall be entitled to be discharged therefrom under any of the provisions of the act 1 Will. 4, c. 36, applicable to his case; and the court shall make such order as shall be just touching the payment of the costs of or attending any such deed, surrender, instrument, transfer, fine or recovery. (1 Will. 4, c. 36, s. 15, r. 15.) [See also other remedies applicable to every case, page 264, infra.]

When the act required is *the delivery or deposit in court or elsewhere of books, papers, or any other articles or things*, and the person to perform the act is committed for the contempt of non-performance, any sequestrator or sequestrators under a commission of sequestration shall have the same power to seize and take such books, papers, articles or things, being in the custody or power of the person against whom the sequestration issues, as they would have over his own property; and thereupon such articles and things so seized and taken shall be dealt with by the court as shall be just, and after such seizure it may, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of that act, make such order for the discharge of the prisoner upon such terms, and if it shall see fit, making any costs, costs in the cause, as to the court shall seem proper. (1 Will. 4, c. 36, s. 15, r. 16.) [See also other remedies applicable to every case, page 264, infra.]

When the act required is *the payment of money, whether costs or not*, one or more writ or writs of *fieri facias*, or writ or writs of *elegit*, may, after the lapse of one month from the time when the order for payment was duly passed and entered, be sued out by the person to whom it is ordered to be paid. (1st G. O., 10th May, 1839.) See the forms of the writs at foot of the orders. This order is in force notwithstanding the 11th and 12th Orders of August, 1841. (*Streeten* v. *Whitmore*, 5 Beav. 228.) The order should state by and

to whom the money is to be paid. (*Taylor* v. *Jardine*, 1 Hare, 316.)

These writs are now prepared by the solicitor, and sealed by the record and writ clerk, on a præcipe being handed to him, and, if for taxed costs, on production of the office copy certificate of costs.

The entering clerk is, at the request of the party, to mark upon the order the day of the month and year when left for entry, otherwise no such writ can issue. (2nd G. O., 10th May, 1839.)

Such writs, when sealed, shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he doth or ought to execute such like writs, and such writs, when returned by such sheriff or other officer, shall be delivered to the clerks in court by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the office of the *six clerks* of this court; and for the execution of such writs such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law. (3rd G. O., 10th May, 1839.)

For "six clerks" and "clerks in court" substitute "record and writ clerks."

It must be borne in mind that where a bill is taken pro confesso against a defendant, and a decree is thereupon made in the cause, no proceeding is to be taken, nor any process issued against that defendant to compel performance of the decree, without leave of the court. (88th G. O., 8th May, 1845.)

If it shall appear, upon the return of any such writ of fieri facias as aforesaid, that the sheriff or other officer hath, by virtue of such writ, seized but not sold any goods of the person ordered to pay such sum of money or costs as afore-

said, the person to whom it is payable shall, immediately after such writ with such return shall be filed as of record, be at liberty to sue out a writ of *venditioni exponas* in the form set out at foot of the said orders, or as near thereto as the circumstances of the case may require. (4th G. O., 10th May, 1839.)

This writ is now also prepared by the solicitor and sealed by the record and writ clerk, as the previous writ.

The sheriff or other officer may be compelled to return these writs, if he neglects doing so, in the same way as he may be compelled to return an attachment, see infra, "*Process of Contempt;*" and if he fails notwithstanding the order of the court requiring him to do so, he will be ordered to pay the costs. (*Evans* v. *Davies*, 7 Beav. 81 ; 13 L. J. 11.)

On every such writ of fieri facias and elegit so to be issued, there shall be endorsed the words "By the Court," and also thereunder the calling and place of residence of the party against whom such writ shall be issued, and also the name and residence or place of business of the solicitor at whose instance the same shall be issued, and the name of the clerk in court issuing the same, and that every such writ be also endorsed for the sum to be levied, according to the form used upon like writs issuing out of the superior courts of common law. (5th G. O., 10th May, 1839.)

For "clerk in court" substitute "record and writ clerk."

The 6th of the same orders provides for the remuneration of the clerk in court and solicitor, but as to the former the order can, of course, be no longer operative. It declares that for every such writ of fieri facias or venditioni exponas so to be issued as aforesaid, there shall be allowed to the clerk in court issuing the same the sum of 18*s.* 7*d.*, and for every such writ of elegit the sum of 1*l.* 10*s.*, and that there shall be allowed to the solicitor in any of the before-mentioned cases 6*s.* 8*d.* for instructions for the writ, and 6*s.* 8*d.* for attending to procure a warrant, and for attending to instruct the officer charged with the execution of the writ.

The fee payable to the record and writ clerk is now 20*s.*,

and is impressed on the writ (G. O., 25th Oct. 1852), and the solicitor's fee for preparing writs is 6*s.* 8*d.* for preparing every writ without order, and 13*s.* 4*d.* for every writ under order, except an injunction. (G. O., 26th Oct. 1842.)

The court has no jurisdiction under the Interpleader Act to interfere where a fieri facias issues, and the goods are claimed by third parties. (*Rock* v. *Cook*, 2 Phil. 691; 12 Jur. 957.) If the writ fails to satisfy the demand, another fieri facias may issue as at common law. (*Spencer* v. *Allen*, 2 Phil. 215; 11 Jur. 93.)

If the demand be for costs, instead of the writ of fi. fa. or elegit, a subpœna may be issued and served; on the sealing of which the certificate or report must be produced to the officer as his authority for sealing it. (2 G. O., 21st Dec. 1833.)

By the 5th General Order, 21st Dec. 1833, every subpœna, other than a subpœna duces tecum, shall contain three names where necessary or required; and that a gross sum or fee of twelve shillings and sixpence shall be the amount allowed in costs for every subpœna duces tecum, including the præcipe, attendance and sum paid for sealing, and five shillings and tenpence each for all other subpœnas; in addition to which last-mentioned sum the solicitor suing out the same shall be allowed one fee of six shillings and eightpence for the præcipes and attendance on sealing such subpœnas as heretofore, where the number of names included therein shall not exceed nine, and if they shall exceed nine in number, then an additional fee of six shillings and eightpence, and if they exceed eighteen, a further fee of six shillings and eightpence, and so on in proportion, for every additional number of nine names included in such subpœnas.

By the 6th General Order, 21st Dec. 1833, no more than three persons shall be included in one subpœna duces tecum, and that the party suing out the same shall be at liberty to sue out a subpœna for each person, if it shall be deemed necessary or desirable; and that the sum of twelve shillings and sixpence shall be allowed in costs for every such

subpœna, including the præcipe, attendance and sum paid for sealing the same.

The subpœna for costs is excepted from the rule that the service of any subpœna shall be of no validity if not made within twelve weeks after the teste of the writ (16th G. O., 8 May, 1845, Art. 1); but it must be served within the jurisdiction. (*Hawkins* v. *Hall*, 1 Beav. 73.) As the costs are payable to bearer a power of attorney is not necessary. (*Empringham* v. *Short*, 12 L. J. 144.) On default being made, an attachment may be issued without order upon an affidavit of service, demand and non-payment. After the sheriff has executed the writ, or returned *non est inventus*, the proceedings pointed out under "*Process of Contempt*," infra, may be taken. In the case of a peer or member of parliament also a subpœna issues, and then, upon affidavit, an order nisi for a sequestration as of course.

[See also other remedies applicable to every case, post, page 264.]

When the act required is *delivery of possession*, the party prosecuting the order is, upon due service of the decree or order, and upon proof made of demand and refusal to obey such order, entitled to an order for a writ of assistance. (13th G. O., 26th August, 1841.) This order only follows in substance the 19th rule of the 15th section of the act 1 Will. 4, c. 36, except that by that rule a writ of execution was required to be first served, whereas that writ has since been abolished by the 10th General Order, 11th April, 1842.

Form of Writ of Assistance.

Victoria, &c.

To the sheriff of ——, as well present as for the future, greeting.

Whereas, according to the tenor and true meaning of an order made in a certain cause depending in our Court of Chancery between A. B., complainant, and C. D., defendant, the said C. D. was ordered and enjoined to deliver up possession to ——, in the said order named, of all that [*state the property to be delivered up*], in the pleadings in the said cause mentioned; yet nevertheless he the said ——, and other ill-disposed persons his accomplices, have refused to pay obedience thereto, and detain and keep the possession of the said messuage [*or* "mansion-house, lands and premises," *or as may be*]

in manifest contempt of us and our said court: Know ye therefore that we, being willing and desirous that justice should be done to the said —— in this behalf, do give unto you full power and authority to place and put the said —— or his assigns, without delay, into the full, peaceable and quiet possession of all and singular the said [*as before*], with their appurtenances, and from time to time, as often as there shall or may be occasion, to maintain and keep him and his assigns in such peaceable and quiet possession, according to the intent and true meaning of the said order of our said court; and therefore we do hereby command and enjoin you, that, immediately after your receipt of this writ, you do go and repair to and enter into and upon the said [*as before*], and that you do remove, eject and expel the said C. D., his tenants, servants and accomplices, each and every of them, out of and from the said [*as before*], and every part and parcel thereof, and that you do place and put the said —— and his assigns into the full, peaceable and quiet possession thereof, and defend and keep them and their said assigns in such peaceable and quiet possession, when and as often as any interruption may or shall from time to time be given or offered to them or any of them, according to the true intent and meaning of the said order, and herein you are not in anywise to fail. Witness ourself, at Westminster, the —— day of ——, in the —— year of our reign.

ROMILLY, M. R.

Endorsement.

Writ of Assistance.

A. B. *v.* C. D.

[*Name and address of solicitor and agent, if any.*]

The record and writ clerk will require, on sealing the writ, to have the order produced to him, and a præcipe, as follows:—

A. B. *v.* C. D. } Seal Writ of Assistance, directed to the sheriff of ——, to deliver possession to plaintiff.

Order dated ——, 1854.

Tested ——, 1854.

[*Name and address of solicitor and agent, if any.*]

In every case if any party who is, by an order or decree, ordered to pay money or to do any other act in a limited time, shall after due service of such order or decree, refuse or neglect to obey the same according to the exigency thereof, the party prosecuting such order or decree shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient party, and in case such party shall be taken or de-

tained in custody under any such writ of attachment, without obeying the same order or decree, then the party prosecuting the same shall, upon the sheriff's return that the party has been so taken or detained, be entitled to a commission of sequestration against the estate and effects of the disobedient party; and in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the party prosecuting the same order or decree shall be entitled at his option either to a commission of sequestration in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he hath hitherto been entitled to upon a return *non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of an order or decree. (11th G. O., 11th April, 1842.)

In the case of costs the above order is not applied, as they are recovered by a subpœna and attachment, or by writ of fi. fa. or elegit. (See ante, p. 259, and infra, "*Process of Contempt.*")

The writ of attachment, with proclamations and writ of rebellion, formerly issued, are abolished by the 6th G. O., 26th August, 1841; and the writ of execution formerly issued to compel obedience to a decree or order is abolished by the 10th General Order, 11th April, 1842, which order also declares that the party required by any order or decree to do any act shall, upon being duly served with such order or decree, be held bound to do such act in obedience to the order or decree.

Every order or decree requiring any party to do an act thereby ordered, *shall state the time*, or the time after service of the order or decree, within which the act is to be done, and upon the copy of the order or decree which shall be served upon the party required to obey the same, *there shall be endorsed a memorandum* in the words or to the effect following, viz.:—

If you, the within-named A. B. neglect to obey this order [*or* decree] by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of

Chancery, or by the serjeant at arms attending the same court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order [*or* decree].

(12th G. O., 11th April, 1842.)

Where the indorsement stated, in the old form, that in default the defendant would be liable to a serjeant-at-arms and a sequestration, the attachment issued under such a service of the order was discharged with costs. (*Hinde* v. *Blake*, 5 Beav. 431 ; 12 L. J. 56.)

Lord Langdale held that the above order does not apply to orders made in a matter, but only to orders and decrees made in a suit. (*Re Blake and Young*, 9 Beav. 209; 10 Jur. 168.)

Although every decree or order should state the time within which an act should be done, yet if that be omitted, it may be remedied by a subsequent order on motion. (*Needham* v. *Needham*, 1 Hare, 633 ; 12 L. J. 378.)

The practice is now the same for enforcing obedience to an order or decree, whether the person entitled to the benefit of the order, or against whom the order is made, is a party to the suit or not. He is in either case entitled to or liable to the same process as if he were a party to the cause. (15th G. O., 26th August, 1841.) But this order refers only to orders and decrees made in a cause, and does not extend to those made in a matter. (*Re Blake*, 9 Beav. 210; *Re Lovell*, ibid. 332.)

Against *a peer, or person having the privilege of parliament*, the attachment does not issue, but, as in the case of want of answer, a sequestration nisi and absolute must issue.

Against *a corporation* a distringas issues instead of an attachment, and afterwards a sequestration.

When a decree is founded on a bill taken *pro confesso* against any defendant, no proceeding is to be taken nor any process issued against such defendant to compel performance of the decree without leave of the court. (88th G. O., 8th May, 1845.)

Proceedings in the Judge's Chambers.

POWER AND JURISDICTION OF JUDGE.

A JUDGE in chambers may dispose of such part of the business of the court as can, without detriment to the public advantage, arising from the discussion of questions in open court, be heard in chambers according to the directions of the act 15 & 16 Vict. c. 80 (s. 11). The chamber business shall be carried on in conjunction with the court business (s. 12), and the judge shall have the same power and jurisdiction in chambers in respect of such business as if sitting in open court (15 & 16 Vict. c. 80, s. 13), and may enter into consideration of any special circumstances which he may deem material, although the decree or order contains no direction on the subject. (*Williamson* v. *Jeffreys*, 9 Hare, App., 56.) Such of the following matters (amongst others having reference exclusively to proceedings before decree) may be disposed of in chambers as the judge shall from time to time think may be more conveniently disposed of in chambers than in open court, viz.:—applications for the production of documents; applications relating to the conduct of suits or matters; applications as to the guardianship and maintenance of infants; matters connected with the management of property; and such other matters as each such judge may from time to time see fit, or as may from time to time be directed by any General Order of the Lord Chancellor. (15 & 16 Vict. c. 80, s. 26.) It is obvious that some of the proceedings here mentioned may be taken as well before as after a decree, yet as they may all be taken in some cases after decree they are properly noticed here. It is also evident that for some of the purposes mentioned a suit is not necessary, although where a suit is instituted any one of these proceedings may be taken during its progress. Under the general authority given by the act the judges have

caused a list of matters entertained at chambers to be made out. These have from time to time been altered, some of the judges reserving for disposal at chambers proceedings which others preferred taking in open court; but it is believed that all the lists are now uniform, and the following are the particular matters agreed by the judges to be disposed of at chambers:—

Applications.

1. As to guardianship of infants (except the appointment of guardians *ad litem*).
2. As to the maintenance or advancement of infants.
3. For the administration of estates under the act of 15 & 16 Vict. c. 86.
4. For time to plead, answer or demur.
5. For leave to amend bills or claims.
6. For enlarging publication, or the time for closing evidence.
7. For the production of documents.
8. Relating to the conduct of suits or matters.
9. As to matters connected with the management of property.
10. For payment into court of purchasers' monies under sales by order of the court, and investing same.
11. For stop orders, where the assignor and assignee concur.

As to some of the above matters, it may be observed that the court had original jurisdiction given to it by the 13 & 14 Vict. c. 35, notwithstanding the provisions of the 3 & 4 Will. 4, c. 94, giving the masters in ordinary that jurisdiction in applications for time to plead, answer or demur, for leave to amend bills, and for enlarging publication, &c.

It may be observed generally that almost any matter that may be disposed of in open court, not involving difficulty, and by consent of the parties, will be disposed of at chambers, but in each case the judge will exercise his discretion. Applications for investment in land of monies paid into court by railway companies may be made either in court or at chambers, when the court is satisfied of the propriety of the purchase, by evidence of value and otherwise; but the title must be submitted to one of the conveyancing counsel of the court for approval. (*In re Caddick*, 16 Jur. 965; 20 L. T. 597.) As to the application for paying purchase-

money into court, where the title is accepted, being a proper one to make at chambers, see *Davenport* v. *Davenport*, 16 Jur. 988. An application for a renewal of a lease of property to a new tenant should be made by summons at chambers. (*Bickford* v. *Chalker*, 1 Eq. Rep. 236; 21 L. T. 192.) And where, under a private act of parliament, the court was enabled to direct inquiries for certain purposes connected with the management of an estate to be made before the master, it was held by the court of appeal (overuling the decision of the court below), that an inquiry might be directed in chambers. (*Thornhill* v. *Thornhill*, 21 L. T. 205.)

The judge in chambers has power to convict a party for giving wilfully evasive answers on his examination before him. (*Hayward* v. *Price*, 22 L. T. 345.)

Sitting in open court, the judge may adjourn for consideration in chambers any matter which in his opinion may be more conveniently disposed of in chambers; or, sitting in chambers, may direct any matter to be heard in open court. (15 & 16 Vict. c. 80, s. 27.) When there is sufficient evidence before the court, and the court referred it to chambers to examine into it, that may be done without drawing up any order; but when further evidence is necessary to support an inquiry at chambers, an order must be drawn up. (*Kelson* v. *Kelson*, 9 Hare, App., 86.)

The judge has the sole power (subject to any rules which may be made by the Lord Chancellor, with the advice and assistance of the chamber judges or any two of them) to order what matters and things shall be investigated by or before his chief clerks, either with or without his direction during their progress, and what matters and things shall be heard and investigated by themselves. (15 & 16 Vict. c. 80, s. 29.) From and after the first day of Michaelmas Term, 1852, the 13th, 14th and 15th sections of the 3 & 4 Will. 4, c. 94, are repealed (15 & 16 Vict. c. 80, s. 35); and from and after the same day all or any of the powers, authorities and jurisdiction given to the masters in ordinary of the court

by any act or acts then in force, may be exercised by the Master of the Rolls and Vice-Chancellors respectively (15 & 16 Vict. c. 80, s. 36); and from and after that day also the powers given to the masters in ordinary and to the court by sections 7, 8 and 9 of the present act (15 & 16 Vict. c. 80) may be exercised by the judge with respect to causes, matters and things which may be depending before him in chambers; and if, when the judge shall be of opinion that any such cause, matter or thing ought to be finally disposed of, unless good cause be shown to the contrary, he shall direct it to stand in his paper in open court, upon such notice, if any, as he shall deem right, and proceed to dispose thereof accordingly. (15 & 16 Vict. c. 80, s. 37.) By the 58th of the General Orders, 16th October, 1852, the powers and authorities given to the masters by any General Order or Orders may be exercised by the judge sitting in chambers.

The power of the court and of the judge sitting in chambers to enlarge or abridge the time for doing any act or taking any proceeding, and to give any special direction as to the course of proceeding in any cause or matter, is unaffected by the General Orders, 16th October, 1852. (Order 59.)

The sale of property under an order is a matter peculiarly under the superintendence of the judge (Order 12); and also the making of allowances to parties interested in property to be sold, where the court is satisfied that there will be a surplus. (15 & 16 Vict. c. 86, s. 57.) Whether in this latter case the word "court" used in the section means also "judge at chambers" is not clear, but the 13th section of 15 & 16 Vict. c. 80, may extend it to chambers.

Under the 42nd section of 15 & 16 Vict. c. 80, the court or any judge thereof may call in the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as they may think fit, the better to enable them to determine any matter at issue in any cause or proceeding, and may act upon the certificate of such persons. This section is construed as not intending that the court should delegate

to the master the power of calling in scientific or other assistance as therein mentioned, but as enabling the judges in the execution of their new functions to obtain the assistance of scientific or other persons; and as to details of a scientific bill not requiring discussion, they will be left to the judges' clerks; but as to the other details, the judge will himself determine them, availing himself of such assistance as may be necessary; and questions of a grave nature requiring discussion will be discussed in open court. This was the course taken by the court on the petition of an architect and builder, a creditor whose debt the master had by a separate report allowed as a claim, upon which, on motion, the court had, before the operation of the new practice, ordered that the creditor should be at liberty to bring an action at law. (*Mildmay* v. *Methuen*, 16 Jur. 965.)

By the 40th section of the same act, also, the court or any judge thereof may act on the opinion of any of the conveyancing counsel appointed under the act in any of the cases there mentioned, and which are all cases in which, according to the former practice of the court, and of the master's office, it has been usual for the master to require or receive the opinion of conveyancing counsel for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof, or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument, or otherwise, and in such other cases as the Lord Chancellor shall by any general order direct; but upon any such opinion being objected to by a party, the point in dispute shall be disposed of by the court or by the judge sitting in chambers, according to the nature of the case. This section is not applicable to the case of an exchange. (*Thornhill* v. *Thornhill*, 17 Jur. 252.) On appeal from the taxing master, the judge, seeking the assistance of any such counsel, or of any accountant, merchant, engineer, actuary or other scientific person, can finally decide what fees shall be paid him. (15 & 16 Vict. c. 80, s. 43.) For the power to appoint convey-

ancing counsel and the orders made in reference thereto, see infra, title "*Conveyancing Counsel.*"

In case of absence of parties or for any other sufficient reason, a judge in chambers may dispense with the service of the order directing any accounts or inquiries upon any party, or may direct substituted service of such order, or direct notice by advertisement or otherwise, instead thereof, at his discretion. (19th G. O., 16th Oct. 1852.) He may also in the prosecution of an order in chambers order further accounts or inquiries to be taken or made, or, if desired by any party, direct the same to be considered in open court. (20th G. O., 16th Oct. 1852.)

The 15th section of the act 15 & 16 Vict. c. 80, enacts, that orders made by a judge in chambers shall have the force and effect of orders of the Court of Chancery, and may be signed and enrolled as such.

Although all the matters comprised under this heading may form proper subjects for the judge to adjudicate upon in chambers, yet some of them may also be properly brought under discussion in open court, according to the nature or importance of the application.

The General Order of the 26th of July, 1853, provides, that in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, any judge of the court may sign and adopt any certificate made by the chief clerk of any other judge, and orders made by any judge of the court may be prosecuted at the chambers of any other judge by his permission; and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. That order also directs, that in all cases in which any judge signs and adopts a certificate made in pursuance of an order made by any other judge, it is to be expressed that he does so for the other judge, and such certificate shall in all future proceedings be deemed to

be signed and adopted by the judge for whom it is signed and adopted, save that no application to discharge or vary such certificate is to be made to the judge for whom the same is signed and adopted, without the leave of the judge by whom it has been signed and adopted; and the judge by whom it has been signed and adopted is to have the same power to discharge or vary the certificate as he would have had if it had been made in pursuance of an order made by himself.

The 2nd General Order of the 1st June, 1854, provides, that any judge of the court whose chambers may be open for business during any vacation may issue summonses for the purpose of any proceeding before the Master of the Rolls or any Vice-Chancellor at chambers after the vacation.

The 7th ibid. provides, that at any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian ad litem to be appointed for any infant, or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order.

APPOINTMENT OF JUDGES' CLERKS AND THEIR TENURE OF OFFICE, &c.

Appointment of Chief Clerks by Judges.

The Master of the Rolls and every Vice-Chancellor for the time being respectively may, with the approbation of the Lord Chancellor, appoint two chief clerks, each to be respectively attached to each such judge and his successors in office to assist in the general business of each court and the causes and matters belonging thereto, and on any vacancy in such office of chief clerk to supply such vacancy. (15 & 16 Vict. c. 80. s. 16.)

Qualifications of Chief Clerks.—Appointment of Three, by Act.

Such chief clerks must have been chief clerks to masters in ordinary, or admitted on the roll of solicitors or attornies

in one of the courts at Westminster Hall, and practised as such solicitor or attorney for ten years at least immediately preceding his appointment; provided always, that George Whiting and Henry Leman, the present chief clerks of Masters Farrer and Brougham, and Charles Pugh, chief clerk in the office of the master now vacant, shall, on the 1st day of Michaelmas Term, 1852, be, and they are hereby appointed chief clerks of three of the said equity judges and their respective successors in office. (15 & 16 Vict. c. 80, s. 17.)

Appointment of Junior Clerks.

The said judges may each appoint a junior clerk to each chief clerk of his court, and on any vacancy in such office to supply such vacancy. (Ibid. s. 18.)

Removal from Office.

Every such clerk is liable to be removed from office by order of the Lord Chancellor, and rendered incapable of afterwards holding any office, situation or employment in the court, if he engage in any other employment whatever while holding such office, or receive any sum of money or benefit other than his salary and what may be allowed or directed to be taken by him under any act of parliament or order of the court or Lord Chancellor, for any act done or pretended to be done, or any attendance given or pretended to be given, either with or without the consent or direction or pretended consent or direction of the judge, in relation to or arising out of any proceeding in his office or any office of or connected with the Court of Chancery, or if, being or having been a solicitor or attorney, any such person directly or indirectly receive or secure to himself any continuing benefit from any business or firm in which he may have been engaged previously to his appointment. (Ibid. s. 19.)

Clerks to cease to be Solicitors or Attornies.

Being solicitors or attornies shall on their appointment cease to be so, and shall forthwith procure themselves to be struck off the rolls of solicitors and attornies. (Ibid. s. 20.)

Tenure of Office.

Every such chief clerk shall hold his office during good behaviour, and so long as he shall personally give his attendance upon his duties, and conduct himself honestly and faithfully in the execution of his duties; but subject to the power contained in act to remove any chief clerk for any cause which the Lord Chancellor and judges removing may think sufficient. (Ibid. s. 21.)

Every such junior clerk shall hold office at the pleasure of the judge to whose court he shall be attached. (Ibid. s. 22.)

Under Control of Judge.

Such clerks shall be respectively under the control of the judge to whose court they shall respectively be attached, and shall attend at such places, during such times and for such hours in each day, and perform such duties, as such judge shall from time to time direct. (Ibid. s. 23.)

Penalties, &c.

Such clerks shall be subject and liable to the same prohibitions, prosecutions, penalties and punishments as are imposed and directed by the act 3 & 4 Will. 4, c. 94, with respect to persons holding office or employment in the Court of Chancery, or under any of the judges as officers thereof. (Ibid. s. 24.)

Removal from Office.

Any such chief clerk may be removed from his office by order of the Lord Chancellor, with the concurrence of the Master of the Rolls and Vice-Chancellors for the time being, or any two of them, without the cause of removal being stated. (Ibid. s. 25.)

POWER OF CHIEF CLERKS.

Besides the ordinary business of taking accounts and making inquiries directed by any order, the chief clerks are subject to any rules of the Lord Chancellor, with the advice and assistance of the chamber judges, or any two of them,

to investigate such matters and things as the judge to whose court they belong shall order, and that either with or without the judges' direction during their progress. (15 & 16 Vict. c. 80, s. 29.) The directions of the judge to his chief clerks require no particular form. (Ibid. s. 32.) The chief clerks may also, for the purpose of any proceedings directed by their respective judges to be taken before them, issue advertisements, summon parties and witnesses, administer oaths, take affidavits and acknowledgments, other than acknowledgments by married women, receive affirmations, and, when so directed by the judge, examine parties and witnesses, either upon interrogatories or vivâ voce, as such judge shall direct. (Ibid. s. 30.) They are also to sign advertisements, and such signature is sufficient authority for their insertion in the Gazette (34th G. O., 16th Oct. 1852); and when any computation of interest, or the apportionment of a fund is directed by the court, to be acted on by the Accountant-General, or other person, without further order, and the order directs the same to be made by a chief clerk attached to the court of the judge making the order, and directs the certificate thereof, signed by such chief clerk, to be acted upon, it is to be acted upon accordingly without the signature and adoption of the judge. (43rd ibid.)

When a party has been examined thrice, and his examinations are insufficient, the chief clerk may not issue an order that such party do attend at a future day to be examined, and that if he do not attend, or if his examination be insufficient, he be committed;—the orders of the chief clerk are the orders of the judge. (*Hayward* v. *Price*, 22 L. T. 345.) The practice in the chambers of Vice-Chancellor Wood, wherever a party gives wilfully evasive answers, will be for the judge to examine him, and, if necessary, to commit him. (Ibid.)

LISTS OF MATTERS AND RECORD OF PROCEEDINGS TO BE KEPT IN CHAMBERS, &c.

At the time of taking out any summons, or making any

appointment, as already observed, the short particulars, showing the date when issued or made, name of cause or matter, by what party, and shortly for what purpose the summons or appointment is obtained, and at what time returnable, are to be entered in "The Summons and Appointment Book," kept at the chambers. (21st G. O., 16th Oct. 1852.)

Lists of matters appointed for each day are to be made out and affixed outside the doors of the chambers of the respective judges, and, subject to any special direction, such matters are to be heard in the order in which they appear in such list. (22nd ibid.)

A register is to be kept of all proceedings in chambers with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at the hearing. (54th ibid.)

In the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, orders made by any judge of the court may be prosecuted at the chambers of any other judge by his permission, and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. (G. O., 26th July, 1853.)

A seal is directed by the 3rd General Order of the 16th October, 1852, to be provided for the chambers of the judges.

PROSECUTION OF DECREE OR ORDER.

THE FIRST SUMMONS.

The first step in prosecuting an order in the judges' chambers, directing any account or inquiry, is to leave a copy of the order at the chambers, the solicitor certifying it to be a true copy of the original as passed and entered (17th G. O.,

16th October, 1852), and thereupon to take out a summons to proceed and serve it on all necessary parties. (18th ibid.) The judges generally require that all papers brought into chambers shall be copied on foolscap paper, bookwise, with a quarter margin, part of which is to be left for a guard margin, of not less than three quarters of an inch. The summons is prepared by the party taking it, and sealed by the judge's clerk, and a second copy is required to be left at the judges' chambers. (3rd ibid.) According to the first of those orders, it may be similar to the following form (which is that now in use), with such variations as the circumstances of the case may require:—

Form of Summons.

In Chancery.

In the matter of John Thomas, an infant,
or Joseph Wilson
against
William Jackson.

Let all parties concerned attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex], [*or*, at No. —, —— Square, Lincoln's Inn, Middlesex], on ——, the —— day of ——, at —— of the clock in the —— noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application*].

Dated this —— day of ——, 185—.

John Romilly, Master of the Rolls, *or*,
Richard T. Kindersley, Vice-Chancellor, *or*,
John Stuart, Vice-Chancellor, *or*,
William Page Wood, Vice-Chancellor.

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for

To

At the time of taking out any summons, or making any appointment, as already observed, the short particulars, showing the date when issued or made, name of cause or matter, by what party, and shortly for what purpose the summons or appointment is obtained, and at what time returnable, are to be entered in "The Summons and Appointment Book," kept at the chambers. (21st G. O., 16th October, 1852.)

This entry is made by the judge's clerk. A summons, not originating proceedings, but being in prosecution of an order, and not being for any purpose mentioned in section 30 of the act 15 & 16 Vict. c. 80, must be served two clear days before the return (5th G. O., 16th October, 1852), except by special leave, and at the time of service the original must be produced and shown. On the return of the first summons, the judge is to be satisfied, by proper evidence, that all necessary parties have been served with notice of the order, and thereupon the judge will give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, but such directions may afterwards be varied or added to as may be found necessary. (18th ibid.) The proper evidence of service of notice is the record and writ clerk's certificate of a memorandum of such service being entered, and an affidavit showing that the parties so served are all who are entitled to notice. The service of the order on any party may, however, be dispensed with by the judge, if on the hearing of the summons it appears that it cannot be effected by reason of absence of the party, or for any other sufficient reason, or under similar circumstances he may direct substituted service, or notice by advertisement or otherwise in lieu of service. (19th ibid.) [See also *Balinhard* v. *Bullock*, 20 L. T. 189.] If the defendants or other parties served with the summons do not attend at the return, an affidavit of service will be required, which should be in the following form:—

Form of Affidavit of Service of Summons, not being a Summons originating Proceedings in Chambers.

In Chancery.

[*State title.*]

I ——, of ——, make oath and say as follows:—

1. I did on ——, the —— day of ——, 185—, serve the

above-named defendant A. B. [*or* "Mr. ——, the solicitor for the above-named defendant A. B., *or*, for ——, of, &c.," *as the case may be*], with a summons in this cause [*or* "matter,"] bearing date the —— day of ——, 185—, issued from and under the seal of the chambers of the Master of the Rolls [*or* "the Vice-Chancellor ——,"] and addressed to the said ——, by delivering to and leaving with the said ——, [*or* "with —— of the said ——,"] at his office [*or* "dwelling-house," *or*, *as the case may be*], situate ——, a true copy of the said summons, and at the same time showing the said —— the said original summons, so under seal as aforesaid, by which summons the said —— was required to attend at the chambers aforesaid, at ——, on ——, the —— day of ——, 185—, at —— of the clock in the —— noon, on the hearing of an application on the part of —— for [*state the object*].

2. I did on ——, the —— day of ——, also serve [*state whom else, and follow the form of the first paragraph as far as the words* "so under seal as aforesaid."]

3. And I further say that there was at the foot of the copy [*or* "copies"] of the said summons so served, and at the foot of the said summons when so produced as aforesaid, a memorandum or statement that such summons was taken out by ——, of ——, solicitor for ——.

If the summons first taken out, or any other summons, is not disposed of upon the return, the parties are to attend from time to time, without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter to which it relates. (16th ibid.) The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motions (23rd ibid.); and notice must be given to all parties concerned of a party's intention to read any affidavit in chambers. (24th ibid.) What length of notice is to be given does not appear. It will be borne in mind that all affidavits used in the court must be divided into paragraphs, each paragraph being numbered consecutively, and confined, as nearly as may be, to a distinct portion of the subject. (15 & 16 Vict. c. 86, s. 37.) Parties attending any proceeding in chambers, without the previous leave of the judge, are not to be allowed any costs of such attendance unless by special order of the court (55th ibid.); and the costs of counsel attending

the judge in chambers are not in any case to be allowed, unless the judge certifies it to be a proper case for counsel to attend. (56th ibid.) The 28th section of the act 15 & 16 Vict. c. 80, requires that the chamber business of the judges shall be proceeded on by summons, and, as near as may be, according to the form now adopted by the judges of the superior courts of common law when sitting at chambers.

ORDER MADE IN CHAMBERS.

When the judge makes an order in chambers, if he does not otherwise direct, it will be drawn up by one of his clerks; but when considered necessary, the judge may direct any order to be drawn up by a registrar as orders made in open court are drawn up, and for this purpose the registrars are, when required, to attend the judges respectively at chambers, as may be found most convenient for furthering the business of the court, and as the Lord Chancellor, with the concurrence of the chamber judges or any two of them, shall from time to time by any General Order direct. (15 & 16 Vict. c. 80, s. 14.) By the 15th section of the same act orders made by the judges in chambers shall have the force and effect of orders of the Court of Chancery, and may be signed and enrolled as such; and by the 28th of the General Orders of 16th October, 1852, such orders are to be entered as and where orders made in open court are entered. Orders appointing guardians and for maintenance and some others are drawn up by the registrars. So also are some orders made by the judges' clerks. Of this class are some of the orders for the production of documents. Orders for time to plead, answer or demur, to enlarge publication and the like, are drawn up in chambers. To enable the registrar to draw up an order, the chief clerk will, after the summons is disposed of, indorse upon his original summons a minute of the order made, which being taken to the registrar's office will be the registrar's warrant for drawing up the order. The original summons is filed by the registrar.

An order made in chambers by a chief clerk is an order of the judge. (*Hayward* v. *Price*, 22 L. T. 345.)

PRODUCTION OF DOCUMENTS.

The 3rd General Order, 1st June, 1851, provides, that the same course of procedure as is now in use as to the production of documents ordered to be produced before the hearing of a cause, shall extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter.

[For the practice regulating the production of documents before the hearing, see ante, page 62.]

ADVERTISEMENT FOR CREDITORS OR OTHER CLAIMANTS.

If the suit be one for the administration of the estate of a testator or intestate, or in which a general body of creditors or other claimants are concerned, or if there be contained in the order an inquiry, or the judge in the course of the prosecution of the order should direct an inquiry as to the heirs or next of kin of the deceased, or any similar direction, one of the first steps directed by the chief clerk under the order will be the issuing of an advertisement for creditors, or such other claimants as are required to be ascertained, as the case may be, to come in and establish their claims. The advertisement is to be prepared by the solicitor and submitted to one of the chief clerks, by whom, when approved, it will be signed, and such signature will be a sufficient authority for its insertion in the "London Gazette." (34th G. O., 16th October, 1852.) A plain copy must also be left at chambers at the time of the signing of the original. The chief clerk will also direct in what papers it is to be inserted. Formerly, a preliminary advertisement issued, which did not specify any time for establishing claims, and afterwards a peremptory advertisement fixing a time for that purpose, although this practice had been of late growing into disuse; but now there shall be only one such advertisement, unless for any special reason more be necessary, and such only one may be

repeated as often and in such papers as may be directed. (33rd ibid.) It must fix the time for proving the claims and appoint a day for hearing and adjudicating thereon, and may be in a form similar to the following, with such variations as the circumstances of the case may require. (35th ibid.)

Form of Advertisement.

Pursuant to a decree or order of the High Court of Chancery, made in a cause

against

the creditors of [*or* "persons claiming debts," *or* "liabilities, affecting the estate of," *or* "the persons claiming to be next of kin to," *or* "the heir of," *as the case may be*], ——, late of ——, in the county of ——, who died in or about the month of ——, are by their solicitors, on or before the —— day of ——, to come in and prove their debts or claims at the chambers of the Master of the Rolls, in the Rolls Yard, Chancery Lane [*or*, of the Vice-Chancellor ——, No. —, —— Square, Lincoln's Inn], Middlesex, or in default thereof they will be peremptorily excluded from the benefit of the said decree [*or* order].

Monday, the —— day of ——, at —— o'clock in the —— noon, at the said chambers, is appointed for hearing and adjudicating upon the claims.

Dated this —— day of ——, 185—.

A. B.
Chief Clerk.

PROOF OF DEBTS AND OTHER CLAIMS.

If a claimant does not come in and prove within the time fixed by the advertisement issued under an order directing an account of debts, claims or liabilities, or an inquiry for next of kin or other unascertained persons, he or she will be excluded from the benefit of the order, unless it be otherwise ordered (9th General Order of 16th October, 1852); or unless it happen that on the day appointed for hearing there remain any claim undisposed of, in which case an adjournment day will be named for proceeding thereon, and on such adjournment day a claimant, who had not come in by the time mentioned in the advertisement, may be heard upon his claim, provided the affidavit or affidavits in support be filed and the claim entered four clear days previously, and if no certificate of debts has in the meantime been made.

(39th ibid.) But after that time claims can only be received by special leave of the judge upon application by summons, and then only upon such terms and conditions as to costs and otherwise as the judge shall think fit. (41st ibid.) A claimant desiring to come in and prove must within the time limited, whether for the first hearing or for the adjournment day, if there be any, or for a day to be appointed upon special application, as lastly mentioned, enter his claim in "The Summons and Appointment Book," for the day on which the hearing is to take place, file his affidavit or affidavits in the Record and Writ Clerks' Office, and give notice of such entry and filing to the solicitors in the cause. (36th G. O., 16th Oct. 1852.) Claimants are not to be required to take office copies of their affidavits, but the party prosecuting the cause or matter is to do so, and produce them at the hearing, unless otherwise ordered (37th ibid.); and claimants of debts, not exceeding 5*l.*, need not attend on the day of hearing, unless required by notice from one of the parties. (40th ibid.) On the day appointed for the hearing of claims, the chief clerk will, in the presence of the parties, proceed to dispose of them, either by allowing or disallowing them, or else by adjourning the consideration of them to a future day; and if any remain undisposed of on the day appointed he will fix a day to further proceed thereon; and if further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may also be given as to the mode of adducing such evidence. (38th ibid.) When required by the judge, the party prosecuting the order must make out and leave in chambers a list of all the claims that are allowed. (42nd ibid.)

According to a decision of Vice-Chancellor Stuart, when a creditor's claim is successfully resisted in chambers, the costs of resisting it must be paid by the claimant, even though he was prevented by injunction from proceeding at law. (*Hatch* v. *Searles*, 2 Eq. Rep. 614; 22 L. T. 315.)

Form of Proof of Debt.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

I E. F. of ——, in the county of ——, make oath and say as follows:—

1. G. H., late of ——, in the county of ——, Esq., the testator named in the decree [*or* order] made in this cause and dated the —— day of ——, was in his lifetime, and at the time of his death, and his estate now is, justly and truly indebted unto me in the sum of £ ——, the balance of an account for [bread and flour sold and delivered] by me to the said G. H. in his lifetime at his request.

2. The paper writing shown to me at the time of swearing this my affidavit and marked A. contains a just and true account of the goods so sold and delivered, and the dates when, and of all sums and sum of money received by me on account thereof.

3. The prices charged in the said account for the said goods are fair and reasonable, and such as are customary in the same trade or business.

4. I have not, nor have nor hath any other persons or person by my order, or to my knowledge or belief, for my use received the said sum of £ ——, or any part thereof, or any security or satisfaction whatsoever for the same or any part thereof [save and except, *if any has been received, state what*], but the whole of the said sum of £ —— now remains justly due and owing to me as aforesaid.

Sworn, &c.

[*If not for goods sold and delivered, instead of the words between brackets, substitute such as will inform the judge of the facts.*

If for a sum due upon a bond or other written instrument, the attesting witness should, in addition to the claimant's affidavit, prove the execution.]

Interest on Debts.—A creditor whose debt does not carry interest, on establishing the same before the master under a decree or order in a suit, was entitled to interest upon his debt at the rate of 4*l.* per cent. from the date of the decree out of any assets which might remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest. (46th G. O., 26th Aug. 1841.) The Master of the Rolls has decided, that interest

is not payable upon the arrears of an annuity, and that it forms no exception to that rule that the annuity is for maintenance and is secured by a bond; but that in an administration suit, upon further directions, the assets of a testator may, after payment of the other debts, be rendered liable, under the above-mentioned 46th Order, for interest upon the arrears of an annuity from the date of the decree, and from the subsequent times of the annuity falling due. (*Lainson* v. *Lainson*, 17 Jur. 1044; 22 L. T. 150.) That such arrears do not carry interest, except under such order, see also *Booth* v. *Leycester*, 3 My. & Cr. 459. By the General Orders of the 16th October, 1852, it is provided, that where an order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is to be computed on such debts as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of 4*l.* per cent. per annum from the date of the order. (10th Order.) The interest will be computed by the party prosecuting the order, and also by the chief clerk.

Costs of Proof.—By the 47th General Order, 11th April, 1842, a creditor who has come in and established his debt before the master, under a decree or order in a suit, shall be entitled to the costs of so establishing his debt; and the sum to be allowed for such costs shall be fixed by the master without taxation, at the time the master allows the debt of such creditor, unless the master shall think that such costs ought to be taxed in the regular mode, in which case the same shall be so taxed by the master, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established. This right is recognized in the judges' chambers.

Interest on Legacies.—Under an order directing an account of legacies, a legatee is entitled to interest at 4*l.* per cent. per annum from the end of one year after the death of the deceased, unless any other time of payment or rate of

interest is directed by the will, and in that case according to the will, unless otherwise ordered. (11th G. O., 16th Oct., 1852.)

MODE OF TAKING ACCOUNTS AND SATISFYING INQUIRIES.

States of facts, charges and discharges are abolished, but when directed, copies, abstracts or extracts of or from accounts, deeds or other documents, and pedigrees and concise statements are to be supplied for the use of the judge and his chief clerk, and where so directed, copies are to be handed over to the other parties; but no copies are to be made of any deeds or documents, where the originals can be brought in, without special direction. (23rd G. O., 16th Oct., 1852.)

The chief clerk will, on the hearing of the first summons to proceed under the order directing the account, fix a time within which the accounting party shall bring it in.

Unless the judge shall otherwise direct, the accounting party is to make out his account, and verify it by affidavit, the items on each side of the account being numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the judges' chambers. (29th ibid.) The account will be proceeded with at the time or times fixed by the judges' clerk on the hearing of the summons, or at such other times as may afterwards be fixed by way of adjournment from time to time. But no new summons need be taken out, the parties being bound to attend every adjournment which concerns them, without further notice, unless it be necessary to give notice to any party or parties not present at the previous meeting; as to which, however, the directions of the chief clerk may be taken. Vouchers must be produced on the taking of the account as formerly.

But, as to the taking of accounts generally, under the 54th section of the act 15 & 16 Vict. c. 86, the court may, in any case where any account is required to be taken, give such special directions, if any, as it may think fit with respect to the mode in which the account should be taken or vouched,

and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the court that the circumstances of the case are such as to require such special directions; and particularly it may, in cases in which it shall think fit so to do, direct that in taking the account, the books of account, in which the accounts required to be taken have been kept, or any of them, shall be taken as primâ facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.

If it be intended to charge an accounting party beyond his admissions, the party intending to do so must give him notice of such intention, stating, as far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner. (30th ibid.)

At the time appointed for proceeding on the accounts, such notice and information being previously supplied, the charging party may produce such evidence as he is able to show the propriety of charging the accounting party with the sum or sums in question. The chief clerk, or, if necessary, the judge, will decide on allowing or disallowing the charge, and his decision may be the subject of an appeal to the judge in chambers, in the manner and at the time shown at a subsequent page.

No parties must attend the taking of an account, or any other proceeding in chambers, at the expense of the estate or any party, without the previous leave of the judge. All costs so incurred are to be disallowed, unless by special order of the court. (55th ibid.)

The practice in satisfying inquiries in chambers is to produce evidence, by affidavit or otherwise, of the facts sought to be established, and a note will be taken by the judge or chief clerk, as the case may be, of the fact established, and of the evidence adduced. If necessary, a statement or pedigree, or other document, for the assistance of the judge or chief clerk, must, when required, but not otherwise, be fur-

nished by the solicitor. This, however, as already seen, is not the rule, but the exception, and is not resorted to except in cases of actual necessity. If for the purpose of establishing a fact in chambers, voluntary evidence cannot be obtained, the next division of this part of the subject points out the manner in which testimony may be obtained from adverse witnesses or parties.

The accounts left in the judges' chambers may from time to time require amendment, additions thereto, or other alterations; and by the 44th General Order, 16th October, 1852, the solicitor prosecuting the order may be required to transcribe accounts that have been altered, so as to render a fair transcript necessary. The court will, in a proper case, adjourn a case to chambers, for a limited time, to ascertain whether the sums mentioned in the master's report properly constitute the residue of the testator's real and personal estate, and to ascertain how much is principal, and how much interest, and to look into the evidence. (*Saunders* v. *Walter*, 16 Jur. 1008.)

EVIDENCE IN CHAMBERS AFTER DECREE OR ORDER.

When the decree or order directing the inquiries or accounts contains any special directions as to the evidence to be adduced, or when the judge in chambers, in exercise of the power given to him by the 30th section of the act 15 & 16 Vict. c. 80, directs one of his chief clerks to take evidence, generally vivâ voce, or directs any particular witness or party to be examined, whether by interrogatories or vivâ voce, those directions must of course be attended to; but otherwise, evidence by affidavit filed in the Record and Writ Clerks' Office will be received as to facts not already proved in the cause, and where such facts have been already proved, the evidence taken in the cause may be read in support of or against any proposition sought to be established in chambers. The office copies, and not the original affidavits, are read in chambers. When the judge

directs the oral examination of a party or witness, the chief clerk issues his summons, to be prepared, however, by the solicitor, as also a copy to be filed in chambers, and which, according to the 2nd General Order, 16th October, 1852, may be, as in practice it is, in a form similar to the following, with such variations as the circumstances of the case may require:—

Form of Summons by Chief Clerk.

In Chancery.

In the matter of the estate of John Thomas, late of ——, in the county of ——, deceased,

or

Joseph Wilson
against
William Jackson.

The defendant William Jackson [*or*, "A. B. of, &c."] is hereby summoned to attend at the chambers of the Master of the Rolls [*or*, "Vice-Chancellor ——"], in the Rolls Yard, Chancery Lane [*or*, "No. —, —— Square, Lincoln's Inn, Middlesex"], on ——, the —— day of ——, at —— of the clock in the —— noon, to be examined [*or*, "to be examined as a witness on the part of the ——,"] for the purpose of the proceedings directed by the Master of the Rolls [*or* "the said Vice-Chancellor"] to be taken before me ——.

Dated this —— day of ——, 185—.

A. B.
Chief Clerk.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for ——.

This summons is issued by the chief clerk, by virtue of the 30th section of the act 15 & 16 Vict. c. 80, under which section also he is empowered to administer oaths, and examine parties and witnesses either upon interrogatories or vivâ voce, as the judge shall direct. If the party or witness summoned do not attend accordingly, he is liable to process of contempt, as in the case of disobedience to an order of the court, or of a writ of subpœna ad test. (15 & 16 Vict. c. 80, s. 31.) The examination may be either by the chief clerk or by counsel or solicitors before him, according to circumstances, and to the directions of the judge. In some cases it

would be proper to engage counsel for the purpose, and in others not; but it is not necessarily an examination *by* the chief clerk, as it may be *before* him only. The parties have a right to attend such an examination, with a view to which notice should be given by the party on whose behalf the examination takes place, to all other parties concerned, and such notice should be served at least forty-eight hours before the examination takes place. A longer notice is, however, in most cases desirable, and sometimes will be directed.

The practice and mode of proceeding in the examination of a witness by or before a chief clerk is the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case (26th G. O., 16th October, 1852); and the original examinations and depositions so taken, being authenticated by the signature of the chief clerk, are to be transmitted by him to the Record and Writ Office, to be there filed, whence any party to the suit or proceeding may have a copy thereof, or of any portion thereof, upon payment of the proper fee. (27th ibid.)

A witness examined vivâ voce before a chief clerk may be cross-examined and re-examined as before an examiner.

Witnesses may also be examined before an examiner after decree or order directing accounts or inquiries, when so directed by the judge, the masters in ordinary having the power so to direct, and all powers of the masters being now vested in the chamber judges; but, it is presumed, that such an examination cannot take place, without such sanction, at the mere desire of the parties, or any of them. This view seems now to be confirmed by an anonymous case reported in the Law Journal, 23rd vol. p. 24, and in which case the Court of Appeal also decided that a special order of the court was not necessary to give the examiner jurisdiction after the hearing. Witnesses who have been examined before the hearing may be again examined in chambers as to the same matters. (*Rogers* v. *Mort*, 10 Hare, App., 53.)

When a party on examination in chambers gives wilfully evasive answers, he will be examined by the judge himself,

who, if necessary, will commit him. (*Hayward* v. *Price*, 22 L. T. 345.)

By the 41st section of the act 15 & 16 Vict. c. 86, evidence entered into after the hearing of a cause shall be taken, as nearly as may be, in the same manner as evidence with a view to such hearing; and by the 38th General Order of 7th August, 1852, such orders, with reference to the examination, cross-examination and re-examination of witnesses, shall extend and be applicable to evidence taken in any cause subsequently to the hearing thereof; but by the 25th General Order of 16th October, 1852, the practice of the court with respect to evidence before the hearing, when applied to evidence to be taken before an examiner in any cause subsequently to the hearing, is to be subject to any special directions which may be given in any particular case. Also by the 10th General Order, 13th January, 1855, the orders of that date are made to apply, as nearly as may be, to evidence taken after the hearing of a cause, as well as to evidence taken previously and with a view to such hearing.

RECEIVER'S APPOINTMENT, SECURITY AND ACCOUNTS.

With respect to the appointment of a receiver, the most remarkable differences between the present and the former practice are that, although the appointment may and most frequently does take place in chambers, there is no report approving the person proposed, and consequently no warrants thereon, and that the judge appoints by order instead of the master by report. Besides which, a receiver may be appointed on application by summons at chambers without an order of the court, when the appointment is required only to continue the office of receiver by appointing a person in the place of a receiver who has died or otherwise ceased to hold his office. In such case the application should not be made in open court.

The party proposing a receiver will file his affidavits in the Record and Writ Office, and these will be of the same character as those used for that purpose before the change of practice, and a summons must be taken out,

to be attended by all parties concerned. On the return of the summons no written proposal is necessary, and the application will be supported by reading the office copies of the affidavits. If the appointment of a receiver is ordered by an order of the court directing any accounts or inquiries, a summons need not be taken for the express purpose of appointing a receiver, as that proceeding may be taken on an adjournment day fixed for that and other purposes, all which may be arranged on the return of the first summons under the order, when the general directions as to its prosecution are given. The propriety of the proposal is shown by affidavits of respectability, competency and other tests of fitness. The willingness of the person proposed should also be shown as well as the value or annual value, as the case may be, and the nature of the property over which the receiver is to have control. The summons, if there be one, must be served on all material parties, and notice must be given them of the intention to use the affidavits filed. On the return of the summons, or on an adjournment day, according to circumstances, the decision will be come to on the appointment or rejection of the person proposed, or, if there be counter proposals, on the appointment of the person most eligible, if either be considered fit for the office.

Before the receiver is actually appointed, unless otherwise ordered, he must give security, to be allowed by the judge and taken before an officer or agent of the court in the country, if there shall be occasion, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as such judge shall appoint, and to account for and pay the same as the court shall direct; or, as the case may be, to be answerable for what he shall receive in respect of the personal estate for the getting in and collection of which he is to be appointed, and to account for and pay the same as the court shall direct; and he is to be allowed a proper salary for his care and pains in receiving such rents and profits;

or, as the case may be, to have an allowance made to him in respect of his collecting such personal estate. (13th G. O., 16th October, 1852.)

The general orders of the court with respect to receivers are, mutatis mutandis, to apply to receivers appointed under orders made after the 1st November, 1852. (14th ibid.)

The security given by a receiver consists of the recognizance of himself and two sureties, who being proposed, and proved by their own affidavits to be worth the sum to be fixed by the judge, will be accepted, unless from other sources it be ascertained that they or either of them are or is not eligible.

The following is the form of affidavit:—

Affidavit of Receiver's Sureties.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

We, E. F. of ——, and G. H. of ——, severally make oath and say as follows:—

1. I, the said E. F., say that I am worth the sum of £—— after all my just debts are paid.

2. I, the said G. H., say that I am worth the sum of £—— after all my just debts are paid.

Sworn by the said E. F. and G. H. at &c.

The cognizors now become responsible to the Master of the Rolls and the senior Vice-Chancellor for the time being. (15th ibid.)

The following is the proper form of recognizance:—

Form of a Receiver's Recognizance.

—— of ——,
—— of ——,
and
—— of ——,

Before our sovereign lady the Queen in her High Court of Chancery personally appearing, do acknowledge themselves and each of them doth acknowledge himself to owe to the Right Honourable Sir John Romilly, Knight, the Master of the Rolls, and ——, the senior Vice-Chancellor

of the said court, the sum of ——, of good and lawful money of Great Britain, to be paid to the said Sir John Romilly and ——, or one of them, or the executors or administrators of them, or one of them; and unless they do pay the same, they the said —— are willing and do grant, and each of them is willing and doth grant for himself, his heirs, executors and administrators, that the said sum of —— shall be levied, recovered and received of and from them and each of them, and of and from all and singular the manors, messuages, lands, tenements and hereditaments, goods and chattels, of them and each of them, wheresoever the same shall or may be found. Witness our said sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and so forth, at Westminster, the —— day of ——, in the —— year of her reign, and in the year of our Lord 185—.

Whereas by an order of the High Court of Chancery, made in a cause wherein —— are plaintiffs, and —— defendants, and bearing date the —— day of ——, it was ordered that a proper person should be appointed to receive [*or, "that upon the above bounden —— first giving security, he should be appointed receiver of"] the rents and profits of the real estates, and to collect and get in the outstanding personal estate of ——, in the said order named:

And whereas the judge to whose court this cause is attached hath ["approved of the said —— as a proper person to be such receiver, and hath"] approved of the above bounden —— and ——, as sureties for the said ——, and hath also approved of the above written recognizance with the underwritten condition, as a proper security to be entered into by the said —— and ——, pursuant to the said order and the general orders of the said court in that behalf; and in testimony of such approbation the chief clerk of the said judge hath signed an allowance in the margin hereof:

Now the condition of the above written recognizance is such that if the said —— do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estates, and in respect of the personal estate of the said ——, at such periods as the said judge shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him, as the said court or judge hath directed, or shall hereafter direct, then the above recognizance shall be void and of none effect, otherwise the same is to be and remain in full force and virtue.

Taken and acknowledged by the above named, &c.

The ——, the judge to whose court this cause is attached, has approved of and allowed this recognizance.

On this security being given and enrolled in the Enrolment Office, the appointment takes place by order of the judge; but if the receiver is named in the order of the court, leaving him to give the necessary security, when such security is completed, the chief clerk issues the following certificate:—

Form of Certificate of Receiver's Security given, and as to passing his Accounts, &c.

In Chancery.

Between A. B. ..... Plaintiff:
and
C. D. ..... Defendant.

In pursuance of the directions given to me by the Master of the Rolls [*or* "Vice-Chancellor ——,"] I hereby certify that in pursuance of the order in this cause, dated the —— day of ——, E. F. of ——, the person who, upon first giving security, is by the said order appointed receiver of the rents and profits of the real estates, and to collect and get in the outstanding personal estate of —— in the said order named, has given security pursuant to the general order of this court, and has entered into a recognizance together with G. H. of ——, and J. J. of —— as his sureties, dated the —— day of ——, which has been approved of by the said judge, in testimony whereof I have signed an allowance in the margin thereof, and such recognizance has been duly enrolled. And I also certify that the said judge has appointed the —— day of —— next, and the same day in each succeeding year, to be the day on which the said E. F. is annually to cause his account to be delivered into the chambers of the said judge; and that the said judge has also appointed the —— day of —— in every year to be the day on which the said E. F. is to pay the balances appearing due on the accounts so to be delivered in, or such part thereof as shall be certified to be proper to be paid as directed by the said order of the —— day of ——.

Dated this —— day of ——, 1854.

The names and descriptions of the sureties should be previously given to the plaintiff's solicitor, to enable him to test their sufficiency by means of private inquiries. Generally the chief clerk will fix a time for this to be done, and a further time, if necessary, within which objections may be made.

By the 64th General Order, 3rd April, 1828, it was pro-

vided, that in every order directing the appointment of a receiver of a landed estate, there be inserted a direction that such receiver shall manage, as well as set and let, with the approbation of the Master; and that in acting under such an order it shall not be necessary that a petition be presented to the court in the first instance, but the Master, without special order, shall receive any proposal for the management or letting of the estate from the parties interested, and shall make his report thereon, which report shall be submitted to the court for confirmation in the same manner as is now done with respect to reports on such matters made upon special reference; and until such report be confirmed, it shall not give any authority to the receiver.

By the General Order, 1st March, 1839, it was provided, that in all cases where a receiver of a landed estate is appointed, with a direction that such receiver shall manage as well as set and let with the approbation of the Master, and such receiver shall, under the provision of the act for the commutation of tithes in England and Wales (6 & 7 Will. 4, c. 71, s. 12), be deemed for the purposes of the said act, an owner of such tithes and lands as therein mentioned, jointly with any other person, the Master shall, without special order, receive any proposal regarding the execution of the said act as to such tithes and lands, and shall make his report thereon; which report shall be submitted to the court for confirmation, in the same manner as is now done with respect to reports made under the 64th of the General Orders, dated the 3rd day of April, 1828, and until such report be confirmed, it shall not give any authority to the receiver.

By the General Order, 23rd April, 1796, it was provided, that the several Masters of this court shall hereafter fix the days upon which all receivers in their respective offices shall annually procure their accounts to be delivered unto the Masters, and also the days upon which such receivers shall pay the balances appearing due on the accounts so delivered

in, or such part thereof as the Master shall certify proper to be paid by them. And it is thereby further ordered, that with respect to such receivers as shall neglect to deliver in their accounts, and pay the balances thereof, at the times so to be fixed for that purpose, as aforesaid, the several Masters to whom such receivers are accountable, shall, from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge them with interest after the rate of 5*l.* per cent. per annum, upon the balances so neglected to be paid by them, during the time the same shall appear to have remained in the hands of such receivers. And it is thereby further ordered, that every receiver acting under the authority of this court shall in each year procure his annual accounts of receipts and payments respecting the estate entrusted to his care, to be examined and settled by the Master, whose duty it may be to inspect the same, within the space of six months next ensuing the time appointed by such Master for the delivery of such account into his office, as is thereinbefore directed; and in case any receiver shall at any time hereafter neglect so to do, a certificate of every such default is thereby required from the Master in whose office such neglect or default shall happen.

By the 63rd General Order, 3rd April, 1828, it was provided, that the Masters, in acting upon the order of the court of 23rd April, 1796, shall be at liberty upon the appointment of a receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the receiver's accounts and payments of his balances, to fix either longer or shorter periods at his discretion; and when such other periods are fixed by the Master, the regulations and principles of the said order shall in all other respects be applied to the said receiver.

On leaving a receiver's account in chambers to be passed, a summons is taken out to proceed upon it (31st ibid.), on

the return of which the items are to be vouched. This summons, like every other, will be prepared by the solicitor or party, and served on the other material parties, and a copy must be left in chambers. All necessary vouchers must be produced. When the account is passed, it is to be entered by the solicitor in the books customarily used, in the form in which such accounts were formerly entered; but the affidavit which used to be written in the receiver's book, and which verified the account entered in the same book, must now only refer to it as an exhibit. (Ibid.) The entering of the accounts by the solicitor is an additional duty cast upon him, which was formerly performed in the Master's Office. The costs of the receiver's appointment, if it be his first account, and of passing the account, and the costs of all parties entitled to attend upon it, are to be produced and taxed at the time of passing the account, the several amounts thereof being included therein.

When the account is passed the chief clerk will prepare a certificate of that having been done, which certificate is to be signed by him and afterwards approved and signed by the judge, filed and forthwith acted upon by payment into court of the balance. This certificate is not subject to the 47th, 48th, 49th and 51st of the General Orders, 16th October, 1852, which enable reports and certificates to be appealed from. (53rd ibid.)

When a receivership is completed, the book containing the accounts is to be deposited in the Record and Writ Office. (32nd ibid.)

When the receiver fails to bring in his account as required by the judge, an order of course may be obtained for him to do so within four days, or stand committed (*Scott* v. *Platel*, 2 Phil. 229); and after due service thereof, an order of committal may be obtained in like manner. Upon the death of a receiver, the court cannot summarily order his representatives to bring in and pass his accounts. (*Lud-*

gater v. *Channell,* 15 Sim. 479; 16 L. J. 248; 11 Jur. 273.)

The balance found due upon the receiver's account when passed is paid into court, upon the certificate being made, in the same way as any other payment into court is effected, for which see "*Accountant-General,*" "*Payment into Court.*"

If the receiver fails to pay in the balance, the court will, on motion with notice, order him to do so within a limited time, which order, being served in the usual way with the proper endorsement, may be enforced like other orders, upon proof of service and the accountant-general's certificate of default.

The recognizance may also be put in suit against the sureties in the Petty Bag Office. (See *Ludgater* v. *Channell,* supra.)

SALE OF PROPERTY.

This is a proceeding that may, in some cases, take place before the hearing of the cause, but for the most part the sale is directed at the hearing, or on further directions. The 55th section of the act 15 & 16 Vict. c. 86, empowers the court to direct a sale of real estate at any time after the institution of the suit; and the 56th section requires that, before any estate or interest shall be put up for sale under a decree or order of this court, an abstract of the title thereto shall, with the approbation of the court, be laid before some conveyancing counsel, to be approved by the court, for the opinion of such counsel thereon, to the intent that the said court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof; and when an estate or interest shall be so put up for sale, a time for the delivery of the abstract of title thereto to the purchaser or his solicitor shall be specified in the said conditions of sale.

The 12th section of the General Orders, 16th October, 1852, also requires that, where an order is made directing any property to be sold, unless otherwise ordered, the same is to be sold with the approbation of the judge to whose court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by the judge, and all proper parties are to join therein as such judge shall direct.

The practice in proceeding to sell under an order of the court, and with the approbation of the judge, is as follows:—A proposal is not left, as was formerly the case, in the Master's Office, but the judge should be satisfied by proper evidence of the nature and quantity of the property to be sold, and of the most beneficial mode of selling it. The opinion of one of the conveyancing counsel appointed by the Lord Chancellor will be taken on the title under the 56th section above noticed. This will be done under the direction of the judge or his chief clerk, the latter of whom will for that purpose deliver to the solicitor who is to conduct the sale a note or memorandum, to be dealt with in manner pointed out under the division, "*Conveyancing Counsel*," p. 306. The particulars of sale are referred to by the memorandum as being marked with the chief clerk's initials. They must therefore be produced to him before the memorandum can issue. The abstract and particulars are then left with the counsel in rotation, unless any particular counsel is selected by the chief clerk for special reasons, and the opinion is obtained. The conditions, if special, are drawn by the counsel whose opinion is taken; but as this, though desirable, is not absolutely necessary, the directions of the chief clerk will be taken and followed. The judge or chief clerk will then proceed to settle the conditions, and the solicitor will get them printed and circulated. The advertisement of sale, bearing a 20*s.* stamp, is prepared by the solicitor, and settled or approved of by the chief clerk, who

will also direct in what papers it is to be inserted. A copy must be left in chambers.

If there be a reserved bidding it must be made a condition of sale. The judge has this power, amongst other, transferred to him from the Master, who derived his power to fix reserved biddings under the 2nd General Order, July, 1851. But independently of this, it is presumed the judge would have had such a power vested in him. To enable the chief clerk to fix the biddings, an affidavit of a surveyor or other competent person, verifying the values of the several lots, must be produced to him.

It will also be necessary to appoint a person to sell the property, and to fix the remuneration to be paid him for so doing. This will be done at one of the adjourned meetings, and for that purpose it must be stated what arrangement has been come to with the person to whom the sale is proposed to be committed, and a bidding paper is prepared by the solicitor. The reserved biddings, if any, will be delivered out by the chief clerk.

A sale under the direction of the court is generally conducted by the plaintiff's solicitor, who is, in all questions that may arise between the vendor and purchaser, to be considered as the agent for all the parties to the suit. (*Dalby* v. *Pullen*, 1 R. & M. 296.) The conduct of the sale is, however, sometimes given to a defendant, and in that case the above rule would not apply.

To enable a party to the suit to bid at a sale that power must be given him either by the decree or order directing the sale, or by a separate order; and in that case the court will deprive him of the conduct of the sale. (See *Sidny* v. *Ranger*, 12 Sim. 118.)

Handbills are also printed and posted under the direction of the solicitor in different parts of the town or place where the sale is to take place.

The solicitor furnishes the auctioneer with a bidding paper, prepared by interleaving with blank leaves a printed copy

of the particulars and conditions of sale, and opposite each lot is written to the following effect:—

Form of Bidding Paper.

At the Auction Mart,
London, 12th June, 1854.

In Chancery.

A. *v.* B.

I bid for the purchase of all the estate and premises mentioned and comprised in Lot One of the printed particulars under which the same are sold, on having a good title made thereto, free from all incumbrances, except as mentioned in such particulars, and according to the conditions therein expressed, the sum of £100

E. F. (*bidder's signature.*)

I bid £120

G. H. (*ditto.*)

I bid £140

I. J. (*ditto.*)

[*And so on to the highest bidder, who signs his name, address and description.*]

At the sale the auctioneer reads aloud the particulars and conditions of sale, and then puts up each lot, putting down each bidding as it is made on the bidding paper. The last bidder, if the property is sold, signs his name, address and description, stating if he is an agent only. If there is a bidder and the property is not sold, owing to a higher reserved bidding, the fact should be stated by the auctioneer. The same form is observed as to each lot.

By the 3rd General Order of July, 1851, it was provided, that when any property is directed to be sold before the Master, the Master shall be at liberty to fix an amount to be paid as a deposit by the purchasers respectively at such sale, and to appoint some proper person to receive the same, who, if required by the Master, shall give security, to be approved of by the Master, duly to account for and pay what he shall receive in respect of such deposit, in such

manner as the court shall have directed in respect to the monies to arise from such sale; and the person appointed to receive such deposits shall, within such time as the Master shall appoint, and without any special order for the purpose, pay the monies which he shall receive in respect thereof (the amount of such monies to be certified by the Master) in such manner as the court shall have directed with respect to the monies to arise from the sale.

This power, among others, is now conferred upon the judge at chambers, but it is presumed that the judge would have had ample power under his general jurisdiction.

When the sale has taken place, the auctioneer must make an affidavit of the result, referring to the bidding paper by way of exhibit, for the satisfaction of the judge.

Form of Affidavit verifying Bidding Paper.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

I, E. F., of ——, Auctioneer, make oath and say as follows:—

1. I am the person appointed to sell the estates by the decree [*or* order] made in this cause, and dated the —— day of ——, directed to be sold and specified in the printed particulars now shown to me, marked (A).

2. I attended on the —— day of ——, at the Auction Mart in the city of London, at — o'clock in the —— noon, and then and there put up the said estates for sale by public auction in the several lots appearing upon the said particulars.

3. The paper writings annexed to the said particulars, and now also shown to me and marked respectively B. and C., contain a true account of the names of the several persons who bid for the said several lots on the occasion aforesaid, and of the several sums of money offered for the same, and the respective persons whose names appear subscribed as the last bidders for the said lots respectively were the best and highest bidders for such lots respectively, and no greater sum of money was offered for the same respectively in my hearing or to my knowledge, and the names or signatures —— and —— set and subscribed to the said paper writings B. and C. respectively, and purporting to be the signatures of the highest bidders for the said lots respectively,

are of the proper handwritings of the said —— and ——, such highest bidders as aforesaid.

4. The said sale was conducted in a fair and open manner, without favour or partiality to any person whomsoever.

On receiving the affidavit just mentioned, the chief clerk will prepare a certificate of the result of the sale.

INVESTIGATION OF TITLE.

SETTLEMENT OF DEEDS.

When an investigation of title takes place in chambers, the party disputing it carries in objections in writing, and a time may be limited for that purpose as in *Pegg* v. *Wisden*, 16 Jur. 1105. If any difficulty then arises, either party may ask to have the objections argued in open court, which request will generally be granted. Under this proceeding, as also in the settlement of leases and other deeds, the court avails itself of the assistance of a conveyancing counsel, and when such assistance is required by the court or by a judge in chambers, the registrar, or, if at chambers, the chief clerk, will deliver a memorandum as mentioned under the following division "*Conveyancing Counsel*," and the other steps are taken thereon as there mentioned.

When a deed is to be settled by the court, it is sent to the judge's chambers, and from thence to the conveyancing counsel. (*In re Bennett's Estate*, 18 Jur. 33.) Where a question arose as to whether a particular covenant should or should not be inserted in a deed of conveyance made in pursuance of a decree, an application to have the point discharged in open court was refused, the Vice-Chancellor Stuart stating, that the conveyancing counsel were the proper functionaries to decide such questions. (*Plumbe* v. *Plumbe; Yates* v. *Plumbe*, 22 L. T. 270.)

Where the conditions of sale stipulate that the title deeds shall be delivered to the purchaser of "the largest lot," those words mean, not the most valuable, but the most extensive. (*Griffiths* v. *Hatchard*, 18 Jur. 649.)

CONVEYANCING COUNSEL.

The Lord Chancellor may nominate any number of conveyancing counsel in actual practice, not less than six, who shall have practised as such for ten years at least, to be the conveyancing counsel, upon whose opinion the court or any judge thereof may act in any of the cases mentioned in the 40th section of the act 15 & 16 Vict. c. 80, and may supply vacancies in such list from time to time, and distribute the business among such counsel as to the Lord Chancellor shall seem fit. (15 & 16 Vict. c. 80, s. 41.)

As to fees payable to such counsel, see "*Fees*," infra.

Distribution of Business.

The business is to be distributed among such counsel in rotation by the first clerk to the registrars for the time being, and during his occasional or necessary absence by the second clerk to the registrars for the time being, and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the registrars as the first registrar for the time being may nominate for the purpose. (1st G. O., 16th Dec. 1852.)

Registrar's Clerk responsible—Record to be kept.

The clerk making such distribution is to be responsible that it is done according to regular and just rotation, and so as to keep secret from all persons the rota or succession of conveyancing counsel to whom such business is referred; and it shall be his duty to keep a record of such references, with proper indexes, and to enter therein all such references. (2nd ibid.)

Mode of obtaining Reference—Counsel's authority to proceed.

When the court, or a judge sitting at chambers, shall direct any business to be referred to any such conveyancing counsel, a short memorandum or minute of such direction is to be prepared and signed by the registrar, if the same shall have been given in court, or by the judge's chief clerk if given in

chambers, and the party prosecuting such direction, or his solicitor, is to take such memorandum or minute to the registrar's clerk, whose duty it shall be to make such distribution as aforesaid; and such clerk is to add at the foot thereof a note specifying the name of the conveyancing counsel in rotation to whom such business is to be referred, and such memorandum or minute is to be left by the party prosecuting such direction, or his solicitor, with such conveyancing counsel, and shall be a sufficient authority for him to proceed with the business so referred. (3rd ibid.)

Inability or refusal of Counsel to accept Reference.

In case the conveyancing counsel in rotation shall, from illness or from any other cause, be unable or decline to accept any such reference, the same shall be offered to the other conveyancing counsel appointed as aforesaid successively, according to their seniority at the bar, until some one of them shall accept the same. (4th G. O., 16th Dec. 1852.)

Court's Power of Preference or Transfer not affected.

The Orders of 16th December, 1852, are not to interfere with the power of the court, or of the judge sitting at chambers, to direct or transfer a reference to any one in particular of the said conveyancing counsel, where the circumstances of the case may in his opinion render it expedient. (5th ibid.)

Distribution of Business from Masters' Office.

When any of the Masters in Ordinary shall request the opinion of any of the conveyancing counsel nominated by the Lord Chancellor under sect. 41 of act 15 & 16 Vict. c. 80 to be taken upon any matter depending before such Master, such business is to be laid before the conveyancing counsel in rotation, to be ascertained in the manner prescribed by the General Orders of the 16th December, 1852.

Chief Clerk of Master to prepare and sign Memorandum or Minute.

A memorandum or minute of every such request is to be

prepared by the Master's chief clerk, and signed by him, and such memorandum or minute, when marked with the name of the conveyancing counsel in rotation, shall be a sufficient authority for such counsel to proceed with such business.

Inability or refusal of Counsel in rotation to proceed.

If the conveyancing counsel in rotation shall be unable, or decline to proceed therewith, the same shall be offered to the other conveyancing counsel nominated as aforesaid successively, according to their seniority at the bar, until some one of them shall accept the same. (1st G. O., 24th December, 1852.)

Abstract of Title to be laid before Conveyancing Counsel on Master's request.

Where under a decree or order of the court, whether already made or hereafter to be made, any estate or interest shall be put up for sale, with the approbation of one of the Masters in Ordinary, an abstract of the title to such estate or interest is, upon the request of the Master, to be laid before the conveyancing counsel in rotation, for the opinion of such counsel thereon, to the intent that the said Master may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest. (2nd G. O., 24th Dec. 1852.)

Power to Master to select a particular Counsel, if expedient.

Notwithstanding the General Orders of 24th December, 1852, the Master may request the opinion of any one in particular of the said conveyancing counsel to be taken upon any matter before such Master, where the circumstances of the case may render it expedient to do so. (3rd ibid.)

Costs of settling Drafts.

Where, in pursuance of any direction by the court or judge, or of any request by a Master in Ordinary, drafts are settled by any of the conveyancing counsel under 15 & 16

Vict. c. 80, s. 41, the expense of procuring such drafts to be previously or subsequently settled by other counsel, is not to be allowed on taxation, as between party and party, or as between solicitor and client, unless the court shall specially direct such allowance. This intimation, however, is not to prevent the allowance of the expense in cases which may already have occurred, where, in the judgment of the Taxing Master, there has been a reasonable ground for laying the papers before other counsel. (Intimation by Lord Chancellor to the Taxing Masters, of 24th December, 1852.)

PAYMENT OF PURCHASE-MONEY INTO COURT.

When property is sold under the superintendence and by order of the court, the purchaser, being approved of by the certificate either of the Master or the chief clerk, as the case may be, is to pay his purchase-money into court. To enable him to do this, a summons should be taken out on his behalf at chambers. It should be filled up in the usual form of the notice of motion lately used to effect the same object. Besides the payment into court, the summons will ask that when paid in the money may not be paid out without notice to the purchaser, who, accepting the title, may also ask to be let into possession, and into receipt of the rents and profits. The application may, however, be in such other terms as any special circumstances may render necessary, the judge having power to deal with it accordingly ; and it may be made without prejudice to any objection to be afterwards made against the title under special circumstances, so as to prevent the accruing of interest. (*Morris* v. *Bull*, 17 L. J. 9; 12 Jur. 4; *Dempsey* v. *Dempsey*, 1 De G. & S. 691; but see *Ouseley* v. *Anstruther*, 18 L. J. 157.) The principal and full interest, without deducting income tax, must be paid in. (*Holroyd* v. *Wyatt*, 16 L. J. 174; 11 Jur. 261; *Dawson* v. *Dawson*, 11 Jur. 984.)

The plaintiff, or other person having the conduct of the sale, and who must have notice of this application by service of the summons, should attend upon it and ask that

the money when paid in may be laid out in the purchase of bank annuities or otherwise, as the circumstances require, unless there be special reason for allowing it to remain unproductive; as, for instance, a prospect of speedy distribution of the fund, or an intention speedily to appropriate it for any of the other purposes of the suit. But, under any circumstances, it may be desirable to obtain the direction for investment upon this summons, as, in case of the cash not being otherwise disposed of, it may afterwards become necessary to make another application expressly for that purpose.

When the order to pay in the purchase-money directs that it shall not be paid out without notice to the purchaser, he should be served with the usual notice served upon parties to the suit of any application to the court to distribute the fund, viz. the petition or order to set down the cause, or notice for that purpose, and an affidavit of such service should be produced to the registrar, unless the purchaser appears by counsel and consents.

When the purchaser neglects to pay in his purchase-money, the plaintiff may move that he be ordered to do so within a limited time, and that he pay the costs of the application. But before this motion can be made he must have accepted the title, or it must have been certified that a good title can be made (*Rutter* v. *Marriott*, 10 Beav. 33); or the court may order a re-sale of the lots purchased by him.

ENTERING INTO POSSESSION.

The purchaser will be let into possession as from the time stipulated for by the conditions generally; or from the quarter day preceding the payment of the purchase-money (*Anson* v. *Towgood*, 1 J. & W. 638); but if the property consists of collieries or mines, where quarter days are not observable, the rule is to give the profits as from the beginning of the month or week in which the purchase takes place, according to the taking of the accounts. (*Wren*

v. *Kirton*, 8 Ves. 502.) Yet if the purchaser delays paying his purchase-money, and such delay is not attributable to the vendor, he will not be allowed an earlier perception of the rents, as he may always entitle himself to an order to pay in his purchase-money without accepting the title. A purchaser cannot be let into possession without prejudice to objections to the title, even upon paying his purchase-money into court. (*Hutton* v. *Mansell*, 2 Beav. 260; *Morris* v. *Bull*, 17 L. J. 9; 12 Jur. 4; *Dempsey* v. *Dempsey*, 1 De G. & S. 691; *Rutter* v. *Marriott*, 10 Beav. 33.)

The order for delivery of possession being served may be enforced, as shown under title "*Enforcing Decree or Order.*"

CONVEYANCE.

The settling of the conveyance proceeds according to the practice of ordinary conveyancing, unless the parties differ respecting it, and in that case the matter is disposed of in the judge's chambers. (See "*Settlement of Deeds,*" ante.) The purchaser is entitled to his conveyance on paying his purchase-money into court, unless he pays it in without prejudice to objections to the title. When the deed is settled, it is engrossed and executed by all proper parties.

EXECUTION OF DEED UNDER THE DIRECTION OF THE COURT.

Where an infant defendant was the party to execute a lease, and the cause stood over for that purpose, the Vice-Chancellor Turner stated the proper course to be to have the deed engrossed and produced to and marked by the registrar, and to file an affidavit that the draft thereof had been settled by one of the conveyancing counsel of the court, and that an order would then be made for the execution of the deed. (*Harvey* v. *Brooke*, 22 L. J. 14; 17 Jur. 1. Two orders in this case were therefore necessary.)

In the case of a reinvestment in land of purchase monies of land taken by a railway company, only one application to the court is necessary; and the draft conveyance, approved by the conveyancing counsel, being engrossed with a blank for the date and other particulars of the order, the court will make one order directing the blank to be filled up and the contract to be completed. (*In re Caddick's Estate*, 17 Jur. 84.)

When the conveyance is settled in chambers, it would seem, by analogy, that the purchaser must pay the costs of his own attendances, unless he make out a special case for exemption. (*Hodgson* v. *Shaw*, 16 L. J. 56; 11 Jur. 95.)

A married woman is incapable of assigning by deed, even as an administratrix, without the valid concurrence of her husband; and if he be an infant, the assignment will be a nullity. (*Derbishire* v. *Home*, 3 De G., M. & G. 80.)

TITLE DEEDS.

The vendor must deliver the title to the purchaser, and if not in his possession it is for the vendor to obtain them. Purchasers of the smaller lots are entitled to a covenant for production of such title deeds not delivered up to them as relate to their respective lots.

RESCINDING THE CONTRACT.

The court will sometimes rescind the contract, if proper circumstances are shown for so doing: such as mistake in giving an unreasonable price; that the person bidding was insane (*Blackbeard* v. *Lindigrew*, 1 Cox, 205); or if possession cannot be obtained except by ejectment. (*Lachlan* v. *Reynolds*, Weekly Rep. 49; 1 Kay, 52; 23 L. J. 8; 22 L. T. 211.) This may be done at the instance of the purchaser. But if on the other hand it is desirable for the vendors that the purchaser should be discharged, he also may apply to the court by motion for that purpose, as in case the purchaser proves not to be in circum-

stances to perform the contract. (*Hodder* v. *Ruffin*, 1 V. & B. 544.) The order is that the purchaser be discharged from his bidding and that the estate may be resold; and also that the purchaser may pay the expenses consequent upon the non-completion of the purchase, and of the motion and former sale and the deficiency (if any) of the price obtained on such re-sale. (*Harding* v. *Harding*, 4 M. & C. 514.) If a person without authority interfere and bid at a sale, even though he does it to prevent a sale at an undervalue, the court will hold him to the purchase. (*Nelthorpe* v. *Pennyman*, 14 Ves. 517.)

SUBSTITUTING PURCHASERS.

The highest bidder may transfer his contract to another person, and procure that person's name to be introduced in the certificate in substitution for his own. Or, even after the certificate has issued, an order may be obtained on motion to that effect; but it must be shown that the original bidder is not deriving any benefit from the transfer, and that there is not any sub-bargain. (*Rigby* v. *Macnamara*, 6 Ves. 515; *Vale* v. *Davenport*, ibid. 614.)

OPENING THE BIDDINGS AND RE-SALE.

The court will open the biddings, under some circumstances, upon securing from the party applying an advance upon the former highest bidding. This is secured by payment of a deposit into court and upon payment of the costs, charges and expenses of the first purchaser. The order may be obtained on motion with notice. The opening of the biddings discharges the original purchaser, who is not allowed to be a sufferer from the re-sale.

There is no fixed rule as to what the advance shall be for re-opening the biddings. In some cases 10*l.* per cent. is accepted; and in others more or considerably less. (See *Brooks* v. *Snaith*, 3 V. & B. 144; *Bourn* v. *Bourn*, 13 Sim. 189; *Manners* v. *Furze*, 17 L. J. 485.) In one case it

was 80*l.* upon a bidding of 730*l.* (*Terson* v. *Hawkins*, 18 Jur. 721.) The deposit offered must, however, in any case amount to at least 40*l.* (*Farlow* v. *Wieldon*, 4 Mad. 460.)

The person obtaining the re-sale, if outbid, receives back his deposit (*Williams* v. *Attenborough*, T. & R. 77), and may be allowed interest upon it, generally 4*l.* per cent. and his costs. (*Gravenor* v. *Miles*, 9 Jur. 838; and see *D'Oyley* v. *Powis*, 1 Cox, 206; *West* v. *Vincent*, 12 Ves. 6.) But as to disallowance of costs, see *Earl of Macclesfield* v. *Blake*, 8 Ves. 214.)

The court will open the biddings a second or third time if an adequate advantage can be secured. A person who obtained an order was outbid at the second sale, and again applied and obtained another order to re-open the biddings, upon his paying all costs. (*Preston* v. *Barker*, 16 Ves. 140.)

To open the biddings, the applicant should come before the certificate or report becomes absolute, unless fraud or other impropriety can be shown. (See *Morice* v. *Bishop of Durham*, 11 Ves. 57; *Fergus* v. *Gore*, 1 Sch. & Lef. 350; *Watson* v. *Birch*, 2 Ves. 51.)

If a purchaser sell his purchase for a profit, the property will be ordered to be resold.

Upon a re-sale, from whatever cause, the proceedings are similar to those upon an original sale. The printed particulars had for the former sale may, however, if there remain enough of them undisposed of, be made available on this occasion.

The 4th General Order, July, 1851, empowered the master to receive proposals by private contract, which power is also possessed by the judge in chambers. A private contract for sale may, therefore, be entered into between the parties, subject to the application of the judge or master, who, on being satisfied by evidence of value and the beneficial nature and fairness of the contract, will direct it to be carried into effect.

CERTIFICATE OR REPORT.

Under any decree or order directing accounts or inquiries the chief clerk certifies to the judge. By the 32nd section of the act 15 & 16 Vict. c. 80, the result of the proceedings before the chief clerk are to be stated by him to the judge in the shape of a short certificate, and shall not be embodied in a formal report unless the judge shall so direct; and the judge, on approving of such certificate or report, shall sign it in testimony of his adopting it. But a certificate as to interest or apportionment of a fund, to be acted on by the accountant-general or other person, need not be signed by the judge when the court directs a computation of such interest or such apportionment to be made by a chief clerk, and directs the certificate signed by such chief clerk to be acted upon by the accountant-general or other person without the signature and adoption of the judge. (43rd G. O., 16th Oct. 1852.) The certificate or report must state the result of any account directed, and is not to set it out by schedule, but is to refer to it, verified by affidavit filed, and specify by numbers which items have been disallowed or varied, and what additions, if any, have been made by way of surcharge. Where the alterations render a fair transcript necessary, it may be required to be made by the solicitor prosecuting the order, and is then to be referred to by the certificate or report. The accounts and transcripts, if any, are to be filed with the certificates or reports referring thereto, but no copies are to be required to be taken by any party. (44th ibid.) Unless some special circumstances render it necessary the certificate or report is not to set out the order, or any documents, evidence, or reasons, but is to refer to the order, documents or evidence, or to particular paragraphs, so as to show upon what the result stated is founded. (45th ibid.) It may be in the following form,

with such variations as the circumstances of the case may require (46th ibid.):—

Form of Certificate of Chief Clerk.

In the matter of ——, [*or*, "Between ——."]
[*State title.*]

In pursuance of the directions given to me by the Master of the Rolls [*or* "the Vice-Chancellor ——,"] I hereby certify, that the result of the accounts and inquiries which have been taken and made, in pursuance of the order in this cause, dated the —— day of ——, is as follows:—

1. The defendants ——, the executors of ——, the testator, have received personal estate to the amount of £ ——, and they have paid, or are entitled to be allowed on account thereof, sums to the amount of £ ——, leaving a balance due from [*or* "to"] them of £ ——, on that account.

The particulars of the above receipts and payments appear in the account marked ——, verified by the affidavit of ——, filed on the —— day of ——, and which account is to be filed with the certificate, except that in addition to the sums appearing on such account to have been received, the said defendants are charged with the following sums [*state the same here, or in a schedule*], and except that I have disallowed the items of disbursement in the said account numbered —— and ——.

[*Or in cases where a transcript has been made.*]

The defendants —— have brought in an account verified by the affidavit of ——, filed on the —— day of ——, and which account is marked ——, and is to be filed with this certificate. The account has been altered, and the account marked ——, and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the —— schedule hereto, and with the interest thereon and costs mentioned in the schedule are due to the persons therein named, and amount altogether to £ ——.

3. The funeral expenses of the testator amount to the sum of £ ——, which I have allowed the said executors in the said account of personal estate.

4. The legacies given by the testator are set forth in the —— schedule hereto, and with the interest therein mentioned remain due to the persons therein named, and amount altogether to £ ——.

5. The outstanding personal estate of the testator consists of the particulars set forth in the —— schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the —— schedule hereto.

7. The incumbrances affecting the said testator's real estate are specified in the —— schedule hereto.

8. The defendants have received rents and profits of the testator's real estate, &c. *in a form similar to that provided with respect to the personal estate.*]

9. The real estates of the testator directed to be sold have been sold, and the purchase-money, amounting altogether to £——, have been paid into court.

N.B.—*The above numbers are to correspond with the numbers in the Decree.*

After each statement the evidence produced is to be stated as follows:—

The evidence produced on this account [*or* "inquiry"] consists of the probate of the testator's will, the affidavit of A. B. filed ——, and paragraph No. —— of the affidavit of C. D. filed ——.

When prepared and settled it is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and is then to be signed by the chief clerk at an adjournment to be made for that purpose; but where, from the nature of the case, it can be drawn and copied in chambers whilst the parties are present before the chief clerk, it must then be completed and signed by him without adjournment. (Ibid.) The certificate or report, being signed by the chief clerk, will, after the expiration of four clear days from the time of such signature, if in the mean time no summons has been taken out for the purpose of taking the opinion of the judge on any points involved in it, which course any party is at liberty to take, be submitted by the chief clerk to the judge for approval, who, if he approves of it, will sign and adopt it as follows:—"Approved this —— day of ——." (49th ibid.) When signed and adopted by the judge the chief clerk is to transmit it, with the accounts and transcripts, if any, to the report office, to be there filed. (50th ibid.) Certificates of computation of interest or apportionment of a fund, which do not require the signature and adoption of the judge, are transmitted and filed, like other certificates signed and adopted by him. (52nd ibid.)

In all cases in which the certificate of the chief clerk is

to be acted upon by the accountant-general of the court without any further order, such certificate may be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party, desiring to take the opinion of the judge thereon, obtains a summons for that purpose before twelve of the clock on that day. And the time for applying to discharge or vary such certificate, when signed and adopted by the judge, is to be two clear days after the filing thereof. (4th G. O., 1st June, 1854.)

With respect to the certificate or report of a master in ordinary, inasmuch as there is not such a communication between him and the court as exists between the judge and his chief clerks, it cannot be rendered subject to all the rules laid down for the observance of the chief clerks; but, nevertheless, all such certificates or reports are to report shortly to the court the result of the master's inquiries. (15 & 16 Vict. c. 80, s. 39.)

The certificate or report is impressed with a 20*s.* stamp.

By the General Order of the 26th July, 1853, it is provided, that, in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, any judge of the court may sign and adopt any certificate made by the chief clerk of any other judge, and orders made by any judge of the court may be prosecuted at the chambers of any other judge by his permission; and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. In all cases in which any judge signs and adopts a certificate made in pursuance of an order made by any other judge, it is to be expressed that he does so for such other judge, and such certificate shall in all future proceedings be deemed to be signed and adopted by the judge for whom it is signed and adopted, save that no application to discharge or vary such certificate is to be

made to the judge for whom the same is signed and adopted, without the leave of the judge by whom it has been signed and adopted; and the judge by whom it has been signed and adopted is to have the same power to discharge or vary the certificate as he would have had if it had been made in pursuance of an order made by himself.

MODE OF OBJECTING TO A CERTIFICATE OR REPORT.

No exceptions will lie to any certificate or report of a chief clerk, although signed and adopted by the judge (15 & 16 Vict. c. 80, s. 33); but the opinion of the judge upon any points may be taken by any party during the proceedings before a chief clerk, at any time, and also upon any proceeding which shall have been concluded, but as to which the certificate or report shall not have been signed and adopted by the judge, the time allowed in the last-mentioned case being four clear days after the certificate or report shall have been signed by the chief clerk. (Ibid., and 47th G. O., 16th October, 1852.) The party desiring to take such opinion must, within the time just mentioned, obtain a summons for that purpose (48th G. O., 16th October, 1852), observing of course the usual practice of leaving a copy at the chambers. When this summons is disposed of, the certificate or report will be filed by the chief clerk in the report office. It will thenceforth be binding on all parties to the proceedings unless discharged or varied either at chambers or in open court, according to the nature of the case, upon application by summons or motion. (15 & 16 Vict. c. 80, s. 34.) It is at the option of a party dissatisfied with a certificate of the chief clerk to have his objections argued either before the judge in chambers or in open court, but if argued before a judge in chambers no rehearing will be allowed in open court, except under special circumstances. (*The York and North Midland Railway Company* v. *Hudson*, 17 Jur. 1090; 22 L. T. 151.)

When a party desires to appeal from a certificate which

has been confirmed by the judge in chambers, the proper course is to apply in open court for an order pro formâ, in conformity with the decision in chambers, and against that order the appeal will lie. (*Briggs* v. *Wilson*, 2 Eq. Rep. 153 ; see also *Rhodes* v. *Ibbetson*, 2 Eq. Rep. 76.)

The power of the court at any time to open any such certificate or report, upon the same or the like grounds as any report of a master of this court which has been absolutely confirmed may be opened, is unaffected. (15 & 16 Vict. c. 80, s. 34.)

The application to discharge or vary the certificate or report after it is signed and adopted by the judge must be made, either by summons or motion, within eight clear days after it is filed. (51st G. O., 16th October, 1852.) The rules as to taking the opinion of the judge on certificates and reports do not apply to certificates on passing receivers' accounts, which certificates may be approved and signed by the judge without delay, and are then to be filed and forthwith acted upon (53rd ibid.); nor do they apply to the following cases.

In all cases in which the certificate of the chief clerk is to be acted upon by the accountant-general of the court without any further order, such certificate may be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party, desiring to take the opinion of the judge thereon, obtains a summons for that purpose before twelve of the clock on that day. And the time for applying to discharge or vary such certificate, when signed and adopted by the judge, is to be two clear days after the filing thereof. (4th G. O., 1st June, 1854.)

The decision of the judge upon the certificate may be appealed against in the manner pointed out under title "*Appeal and Rehearing*."

PROCEEDINGS IN THE MASTER'S OFFICE.

As the abolition of the office of master in ordinary has not

an immediate operation, many matters continue to be dealt with before the masters; but the mode of proceeding in such cases being, as it is required to be by the act 15 & 16 Vict. c. 80, so nearly like the practice in the judge's chambers, it is unnecessary to go into the details of each proceeding before the master, those details having been considered in connection with the judges' chambers.

By the third section of the act 15 & 16 Vict. c. 80, it is provided that the Lord Chancellor may direct either of the masters to work out any particular matter or matters depending before him, and that such master shall prosecute the same accordingly as if he had not been released from his duties. Again, the 10th section, which enacts that no future references shall be made to the masters in ordinary, has the following qualification, "except in cases in which from some previous reference connected therewith the court may think it expedient, and except in matters arising under the Joint-Stock Companies' Winding-up Acts, 1848 and 1849; but while any masters remain in office, and are not released under the act 15 & 16 Vict. c. 80, they shall prosecute all the business depending before them on the first day of Michaelmas Term, 1852, and all references made before that day under decrees or orders of the court, or which on or after that day shall be made in relation to such excepted matters as aforesaid, and the same, if necessary, shall be distributed amongst the remaining masters as the Lord Chancellor shall direct; and their present powers and authorities are reserved to them for the execution and performance of all the duties, matters and things which may be still referred to them, or which they may be lawfully called upon to perform." This section does not apply to orders still in operation, but pronounced before the passing of the act. (*Clarke* v. *Vernon*, 21 L. T. 238.)

With regard to the assimilation of the practice of the masters' office to that of the judges' chambers, the 39th section of the same act requires that the former shall, from

and after the first day of Michaelmas Term, 1852, so far as consistent with the rules and regulations to be made by the Lord Chancellor, with the advice and consent therein mentioned, be abolished; and that the masters shall, with reference to the proceedings before them, adopt all such rules and regulations, and conduct the business of their respective offices as nearly as may be in the manner in which similar business shall be conducted by the chamber judges, save only that the master, instead of communicating directly with the judge, is to report shortly the result of his inquiries to the court. In acting upon this section of the act, the masters have discontinued the practice of issuing warrants on every occasion when parties are required to attend before them, but issue them only at the commencement of each distinct inquiry or account directed to be made or taken, or when it is considered necessary to give the proper notice to parties not already in attendance upon the proceeding pending before them, the practice being to adjourn the warrant originally taken out to a future day, and, if necessary, from time to time until the proceeding is finally disposed of. The following warrants are still issued by the masters, viz.:— the warrant to show cause why the warrant on preparing a draft report should not issue; the warrant on preparing the draft report; one warrant to settle, which is adjourned from time to time if necessary; and the warrant to sign the report. These may be considered necessary by reason of the difference which exists between the mode of objecting to a master's report and the mode of objecting to a chief clerk's certificate or report, the latter practice not being applicable to the master's report, which circumstance requires that an opportunity should be given to the complaining party to carry further evidence into the master's office, if he desires to do so, and which he cannot do after the warrant on preparing has issued, and again to leave objections to the report, which he may do between the issuing and the return of the warrant to sign.

A master's report, if of such a nature as to require confirmation at all, must still be confirmed by orders nisi and absolute, unless by consent, when it may be confirmed absolute in the first instance, or unless the confirmation is obtained, as in some cases it is, on a petition praying for consequential directions, which practice, however, is not applicable to general reports, but chiefly to those made pursuant to order obtained on petition. On this point, however, it is sufficient to state that the practice is not varied.

A master's report may be excepted to as before, the practice not being altered in this respect; and the deposit on such exceptions will be subject to the course pointed out (ante) respecting deposits upon appeals. But it was held that an objection as to the nature and amount of security for costs required by the master was properly taken by motion, and not by exception. (*Payne* v. *Little*, 16 Beav. 563.)

To object to a master's report on a claim, exceptions are necessary, as if the suit were by bill. (*Ewington* v. *Fenn*, 10 Hare, App., 40.)

As one of the great objects of the recent change of practice was to have readily disposed of matters that were then or might be depending in the masters' offices, certain powers are given to the masters to that end. By the 7th section of the act 15 & 16 Vict. c. 80, they are empowered to summon any parties to any cause, matter or thing depending before them, or referred to them, or their solicitors, and thereupon to proceed and give directions and make orders for the purpose of settling and winding up the same; but any such order may be discharged or varied by the court upon application; and the masters may proceed in the absence of any parties or solicitors neglecting or refusing to attend. Under the 8th section also they may dispose partially of causes, matters and things, if unable to dispose thereof finally, and may report or certify on the whole case, and thereupon the court may make such order as it shall think proper on all or

any of the parties for further prosecution or final disposal of the suit or matter, and for costs, including any costs incurred by reason of the conduct of the parties. And by virtue of the 9th section, the masters may, on refusal or neglect of parties or their solicitors, within a time to be fixed by them respectively, to bring a master's report or certificate before the court, direct it to be done by the solicitor to the Suitors' Fund; and the court may order payment of such solicitor's costs and expenses out of such of the funds in the cause, matter or thing, or by such parties, as may seem just; and in case payment thereof cannot be obtained by those means, may direct them to be paid out of the Suitors' Fund.

By the 17 & 18 Vict. c. 100, s. 1, it is enacted, that upon a suit in which any proceeding may from time to time be depending before a master in ordinary of the High Court of Chancery becoming abated by death, marriage or otherwise, or becoming defective by reason of some change or transmission of interest or liability, it shall be lawful for the master, notwithstanding that the suit has become abated or defective, to summon as he shall deem fit all or any of the parties to the suit or proceeding, or their or any of their solicitors, and to require and obtain from them or any of them such information as may to him seem necessary or proper respecting the abatement of the suit, or respecting the same having become defective and the change or transmission of interest or liability, and respecting the person or persons by and against whom the suit and proceedings ought to be revived, or the decree or order carried on and prosecuted; for which purposes the master shall be at liberty to proceed in the absence of any of the parties or solicitors neglecting or refusing to attend his summons.

The 2nd section enacts, that in case the matter shall, by the means aforesaid or otherwise, obtain sufficient information for his guidance in this behalf, he shall be at liberty to certify the abatement of the suit, or that the same has be-

come defective and the change or transmission of interest or liability.

The 3rd section enacts, that the master's certificate shall be filed by such person as the master may direct, and then such order to the effect of the usual order to revive or of the usual supplemental decree as is mentioned in the section numbered 52 of the act "to amend the Practice and Course of Proceeding in the High Court of Chancery," passed in the session of parliament holden in the fifteenth and sixteenth years of the reign of her present majesty, shall be drawn up by the registrar upon the master's certificate, which shall be deemed equivalent to such allegation as is in the said section mentioned; and the course of proceeding upon and the effect of an order obtained under these present provisions shall be the same in all respects as if the order had been obtained upon such allegation as aforesaid.

The 4th section enacts, that in case the master shall not be able to obtain sufficient information for his guidance in certifying as aforesaid, he shall be at liberty to certify the abatement of the suit, or that the same has become defective and the change or transmission of interest or liability, and that by reason thereof he is unable to dispose of the proceeding depending before him in the suit; upon which certificate the court shall make such order as it shall think proper on all or any of the parties for the further prosecution of the suit, or for the final disposal thereof, and for the payment of the costs thereof, including any of the costs which may have been incurred by reason of the conduct of the parties.

The 5th section enacts, that in the event of the parties or their solicitors refusing or neglecting, within a time to be fixed by the master, to file or to bring before the court any such certificate as aforesaid, or to serve any order when drawn up as aforesaid, then by direction of the master the certificate may be filed or brought before the court, or the order may be served, by the solicitor for the time being to the Suitors' Fund; and the court is hereby empowered to

order payment of the costs and expenses of the solicitor to the Suitors' Fund out of such of the funds in the suit, or by such parties as to the court shall seem just; and in case payment thereof cannot be obtained by any of the means aforesaid, the same, by the direction of the court, may be paid out of the Suitors' Fund.

The 7th section enacts, that in any cause, matter or thing which may from time to time be depending before or have been referred to a master he shall be at liberty to certify specially any decision at which he may arrive, or any other matter relating thereto, in order to obtain a decision or direction by or from the court for his guidance in the further proceedings, or to enable any party to obtain the opinion of the court with reference thereto.

As a general rule, states of facts, charges and discharges are not now used before the master, the necessary facts being brought to his knowledge by means of the evidence adduced; but, under special circumstances, the master does direct a concise statement to be laid before him. These cases are, however, very rare; and, if they can be avoided, they must and ought to be, as the practice is in violation of the spirit of the reform, unless it be resorted to only in cases of necessity.

Notwithstanding the new regulations for taking accounts, the court directed the master to proceed with the defendant's account carried in and verified by his affidavit, without requiring a copy to be left for the use of the master or his chief clerk. (*Cannan* v. *Evans*, 21 L. T. 124.)

A party to the cause was ordered by the Vice-Chancellor Stuart to be examined vivâ voce before the master, though the decree were made before the passing of the act 15 & 16 Vict. c. 86. (*Hextall* v. *Cheatle*, 20 L. T. 139.) The same judge made a similar order by consent as to parties and witnesses (*Glengall* v. *Johnston*, 20 L. T. 189); but according to the case of *Booth* v. *Tomlinson* (16 Beav. 251; 22 L. J. 75), the power relates only to causes brought into the mas-

ter's Office after the act came into operation, the master of the Rolls observing that causes already in the master's Office must be proceeded with according to the old practice. The application was refused. (See also *Wood* v. *Homfray*, 14 Beav. 7.)

A witness having failed to attend on his subpœna before the master was ordered to attend and give evidence, or stand committed. (*Brook* v. *Biddall*, 2 Eq. Rep. 637.)

By the 17th General Order, 22nd April, 1850, the orders relating to claims, it is provided, that under every order of reference to the master under these orders, the master is, unless the court otherwise orders, to be at liberty to cause the parties to be examined on interrogatories, and to produce deeds, books, papers and writings as he shall think fit, and to cause advertisements for creditors, and if he shall think it necessary, but not otherwise, for heirs and next of kin, or other unascertained persons, and the representatives of such as may be dead, to be published in the usual forms, or otherwise, as the circumstances of the case may require; and in such advertisements, to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded the benefit of the order; and in taking any account of a deceased's personal estate under any such order of reference, the master is to inquire and state to the court what part, if any, of the deceased's personal estate is outstanding or undisposed of, and is also to compute interest on the deceased's debts, as to such of them as carry interest, after the rate they respectively carry, and as to all others, after the rate of four per cent. per annum, from the date of the order, and to compute interest on legacies, after the rate of four per cent. per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, but in that case according to the will; and under every order whereby any property is ordered to be sold with the approbation of the master, the

same is to be sold to the best purchaser that can be got for the same, to be allowed by the master, wherein all proper parties are to join, as the master shall direct.

By the 18th ibid. it is provided that, if, upon the proceedings before the master, under any such order, it shall appear to the master, that some persons, not already parties, ought to attend or to be enabled to attend the proceedings before him, he is to be at liberty to certify the same; and upon the production of such certificate to the record and writ clerk, the plaintiff may sue out a writ of summons, requiring the persons named in such certificate to appear to the writ, and such persons are thereupon to be named and treated as defendants to the suit.

Instead, however, of serving a writ of summons, now abolished, serve a printed copy of the claim.

By the 20th ibid. it is provided, that the persons so summoned, having appeared, are to be at liberty to attend, and to be entitled to notice of the proceedings before the master under the order of reference, subject to such directions as the master may make in respect thereof.

When a master wishes for the opinion of a conveyancing counsel upon any matter depending before him, he takes the opinion of one of the counsel nominated by the Lord Chancellor under the 41st section of the act 15 & 16 Vict. c. 80, for which purpose the chief clerk of the master makes out and signs a memorandum or minute similar to that prepared by the chief clerks of the judges, and this memorandum is taken to the registrar's office and dealt with exactly in the same way as that of a judge's clerk (see ante, "*Conveyancing Counsel*"); and if the counsel in rotation is unable or declines to proceed with the reference, it is offered to the other counsel so nominated successively, according to their seniority at the bar, until one of them accepts it. (1st General Order, 24th December, 1852.) The master must require the opinion of one of such counsel to be taken on the abstract of title to any estate or interest directed by the court

to be sold with his approbation, in order to enable him to give such directions as may be necessary respecting the conditions of sale (2nd ibid.); and he may select any one in particular of such counsel, where the circumstances of the case render it expedient to do so. (3rd ibid.)

In a cause referred to the master before the operation of the new practice to take partnership accounts, upon a petition being presented under section 42 of the act 15 & 16 Vict. c. 80, praying that the prosecution of the decree might be transferred to the judge at chambers to have the assistance of an accountant, the court held that to be the proper course, the statute not giving the master jurisdiction to call in the aid of accountants or men of science. (*Morrell* v. *Tinbler*, 20 L. T. 217.) But now, by the 17 & 18 Vict. c. 100, s. 6, it is enacted, that in any cause, matter or thing which may from time to time be depending before or have been referred to a master, it shall be lawful for him, in such way as he may think fit, to obtain the assistance of an accountant, the better to enable him to make any report or certificate, and to act upon the certificate of such accountant; and the allowances in respect of fees to the accountant shall be regulated by the taxing master of the court.

The 42nd section of the 15 & 16 Vict. c. 87, empowers any master in ordinary, and the chief clerk of any such master, and every other person appointed in that behalf by any such master, to sell any goods or chattels, lands, tenements or hereditaments, or any interests therein, under any decree or order of the court, by auction or by any other mode of sale by competition, without any licence as an auctioneer, and without being liable to the duty imposed by the act 8 & 9 Vict. c. 15, or any other act or acts in force; and by the 43rd section, the masters and their chief clerks are indemnified against all liability in respect of former sales.

FURTHER DIRECTIONS AND FURTHER CONSIDERATION.

A cause is set down for further directions when by the decree or order on the hearing of the cause a reference is made to the master in ordinary, reserving further directions, and a report made under that reference and confirmed; but when a cause is referred to the judge's chambers, and a certificate or report is made by the chief clerk, the cause comes on not *for further directions*, but *for further consideration*, a distinction which should be borne in mind. A cause is also set down for further directions on the equity reserved, after an issue at law has been directed. The cause is set down before the judge to whose court it is attached.

SETTING DOWN CAUSE FOR FURTHER DIRECTIONS.

For this purpose a short petition of course is prepared on unstamped paper, stating the decree, not at length, but merely that it directed a reference as to certain accounts or inquiries, and that the master has made his report, dated the —— day of ——, which has been absolutely confirmed, and praying that the cause may be set down for hearing on further directions, and if desired, as to the matter reserved by the decree, next after the pleas, demurrers, exceptions, causes, claims, further directions and further considerations already set down for hearing before his Honor the Vice-Chancellor. If the cause is attached to the court of a Vice-Chancellor, it is addressed to the Lord Chancellor; if attached to the Rolls, it is addressed to the Master of the Rolls. Subscribe on it the name or firm of the solicitor or solicitors setting it down, the party for whom acting, and the date; take it, with the judge's book, to the proper division of the order of course seats, and the registrars' clerk there will then, on production also of the order absolute confirming the master's report, set down the cause, and, upon being provided with the stamped form of order, which is obtained from the sta-

tioner in the registrar's office, will afterwards draw up the order to set down the cause. There is a slight variation from this practice when the cause is to be heard at the Rolls, in which case the petition must be stamped with a 7*s.* Chancery stamp, and must be presented at the Rolls and the order obtained there. In both cases the order must be served on all the solicitors in the cause, and an affidavit of such service filed ready for the hearing.

The above practice is by virtue of the General Order of the 23rd February, 1850, which provides, that on and after the said first day of March next, all causes for further directions, or on equity reserved after a trial at law shall have been had, or the certificate of a court of law shall have been obtained, in pursuance of a decree or order pronounced by the Lord Chancellor, or one of the Vice-Chancellors, and all pleas, demurrers, exceptions and objections for want of parties, required to be heard before the Lord Chancellor, or one of the Vice-Chancellors, shall be set down by the registrars for hearing, on orders drawn up by them upon petition to the Lord Chancellor, left with the registrar, without any fiat or direction from the Lord Chancellor.

For the practice in setting down a cause, the further consideration of which has been adjourned, see "*Setting down Cause for further Consideration.*"

SETTING DOWN CAUSE FOR FURTHER CONSIDERATION.

A petition is not necessary for this purpose, and no order is required to set down the cause after adjournment, it being provided by the General Order of the 4th March, 1853, that when any cause shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days and within fourteen days from the filing of the certificate or report of the chief clerk of the judge to whose court the cause is attached, be set down by the registrar in the cause book

for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the cause; and after the expiration of such fourteen days, the cause may be set down by the registrar, on the written request of the solicitor for the plaintiff or for any other party. The same order gives the form in which, or to the effect of which, the request may be, which is as follows:—

In Chancery.

A. *v.* B.

I request that this cause, the further consideration thereof was adjourned by the orders of the —— day of ——, may be set down for further consideration before his Honor the ——.

Dated, &c.

C. D.
Solicitor for [the plaintiff.]

Before the cause can be set down, the office copy of the chief clerk's certificate must be produced, (or) a note of the day on which the same was filed endorsed on the request and signed by the clerk of reports.

Although set down, the order requires that the cause shall not be put into the paper for further consideration until after the expiration of ten days from the day on which it is set down, and that it shall be marked in the cause book accordingly. By the same order, a notice in the form or to the effect of the following is to be given to the other parties in the cause at least six days before the day for which the cause is marked for further consideration:—

In Chancery.

A. *v.* B.

Take notice that this cause, the further consideration whereof was adjourned by the order of the —— day of ——, was on the —— day of ——, set down for further consideration before his Honor the ——, for the —— day of ——.

Yours, &c.

C. D.
Solicitor for [the plaintiff.]

To Mr. ——,
Solicitor for [the defendant.]

The following is the form of affidavit of service with which the plaintiff should be prepared at the hearing.

Form of Affidavit of Service of Notice of cause being set down for further Consideration.

In Chancery.

Between A. B..... Plaintiff;
and
C. D. and E. F. ..... Defendants.

I ——, of ——, make oath and say as follows:—

1. I did on ——, the —— day of ——, serve Mr. ——, the solicitor for the defendant C. D. in this cause, with a notice in writing, purporting that this cause, the further consideration whereof was adjourned by the order of the —— day of ——, was on the —— day of —— set down for further consideration before his Honor the Master of the Rolls [*or* "Vice-Chancellor ——," *as the case may be*], for the —— day of ——, by delivering such notice to, and leaving the same with a clerk [*or* "servant," *or as the case may be*], of the said Mr. ——, at his office [*or* "otherwise,"] situate at ——, in the county of Middlesex.

2. I did also on ——, the —— day of ——, serve Mr. ——, the solicitor of the defendant E. F. in this cause, with a notice in writing in the words and figures, and to the purport and effect of the said first mentioned notice, by delivering, &c. [*as above*].

Sworn, &c.

The above regulation does not extend to causes referred to masters in ordinary, which continue to be set down for further directions on petitions of course as before; nor to causes originated by summons, unless some special reason exist for bringing on the cause in open court, which, however, can seldom, if ever, happen; and if so brought on, it will probably be at the peril of costs.

When any cause originating at chambers shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days and within fourteen days from the filing of the certificate or report of the chief clerk of the judge to whose court the cause is attached, be brought on for further consideration by a summons to be taken out by the plaintiff or party having the conduct of the cause, and after the expiration of such fourteen days by a summons to be taken out by any other party, and such summons is to be in the form prescribed by the Order No. 1 of the 16th Oc-

tober, 1852, and set forth in the Schedule (A.) thereto, and the object of the application may be stated as follows:—"*that this cause, the further consideration of which was adjourned by the order of the —— day of ——, 1854, may be further considered.*" This summons must be served six clear days before the return.

THE HEARING ON FURTHER DIRECTIONS OR ON FURTHER CONSIDERATION.

The briefs in either of these cases are the same. They consist of the original brief held by counsel on the hearing, together with briefs of the order or decree directing the reference, the certificate or report and any necessary observations. The schedules to the report and certificate are not required by counsel, except under special circumstances which may render it necessary to refer to them, which, however, seldom happens. The court must be supplied with copies (not briefs) on brief paper of the decree or order and certificate or report with schedules. These should be left with the secretary or the officer at the court before the hearing. The cause will come on in its turn, and be proceeded with as in the case of an original hearing.

By the 13 & 14 Vict. c. 35, s. 28, it is provided, that the court may, at the hearing of any cause, or of any further directions therein, notwithstanding any rule or practice of the court to the contrary, receive proof by affidavit of all proper parties being before the court, and of all such matters as are necessary to be proved, for enabling the court to order payment of any monies belonging to any married woman, and of all such other matters, not directly in issue in the cause, as in the opinion of the court may safely and properly be so proved.

When the defendant does not appear, it appears to be sufficient if the affidavit of service is produced to the registrar and not in court. (*Trewick* v. *Paramore*, 7 Jur. 1123.) The court will not, on further directions, direct an inquiry as to wilful default. (*Coope* v. *Carter*, 2 De G., M. & G. 292; 21 L. J. 570.)

COSTS.

SOLICITOR'S BILL, ITS DELIVERY AND TAXATION.

Attornies and Solicitors not to commence an Action for Fees till One Month after Delivery of their Bills.

By the 37th section of the 6 & 7 Vict. c. 73, it is enacted, that from and after the passing of this act no attorney or solicitor, nor any executor, administrator or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill.

Delivery to the client's agent of an unsigned bill, accompanied by a letter signed by the solicitor and referring to it, is a compliance with the act. (*Re Bush*, 8 Beav. 66.) A solicitor delivering an unsigned bill is bound by it, whilst the client may either treat it as a nullity or as a bill duly delivered under the statute. (*Re Gedye*, 14 Beav. 56; 20 L. J. 410; 15 Jur. 851.) A bill delivered by the solicitor's agent may be referred for taxation on the application of the party chargeable, though not signed nor inclosed in a letter referring to such bill. (*Re Pender*, 2 Phil. 69; 16 L. J. 25; 10 Jur. 891.)

Reference of Bills, whether relating to Business transacted in Court or not, for Taxation.

Upon the application of the party chargeable by such bill within such month, it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference. (Sect. 37.)

This order is usually obtained upon petition of course at the Rolls, alleging that the petitioner employed A. B. as his solicitor in a certain suit in that court, in which the petitioner was plaintiff, and C. D. and others were defendants (or as the case may be), and in other matters (if that be so); that the said A. B., on or about the —— day of ——, delivered his bill of fees and disbursements, which, as the petitioner is advised, contains many unreasonable and extravagant charges; that the petitioner submits to pay what shall appear to be due to the said A. B. on the taxation of his said bill. The petition then prays for a refer-

ence for taxation and that all usual directions may be given. (See *Re Thurgood*, cited p. 338.)

If a party applies for a special order where a common order might have been had, he must pay the costs of the application in any event. (*Re Bracey*, 8 Beav. 266; 14 L. J. 299; 9 Jur. 417.)

Some of several parties liable may, on special application, obtain an order to tax. (*Re Hair*, 10 Beav. 187; 11 Jur. 139.) But where one of several parties jointly liable obtained an order of course it was discharged for irregularity. (*Re Perkins*, 8 Beav. 241; 9 Jur. 220; *Re Lewin*, 16 Beav. 608. See also *Re Chilcote*, 1 Beav. 421; *Lockhart* v. *Hardy*, 4 Beav. 224.)

A married woman must apply by her next friend where the business relates to her separate estate (*Re Waugh*, 15 Beav. 508; 21 L. J. 567); otherwise she will be ordered to give security for costs, or the order will be discharged (ibid.); the next friend will be liable for the costs of the order and taxation, but not for anything beyond this. (Ibid.)

The taxing master has power, under an order of course to determine a question of liability and retainer other than those as to which the retainer is admitted by the petition (*Re Bracey*, 8 Beav. 266; 14 L. J. 299; 9 Jur. 417); and it is his duty to inquire what sums applicable to the payment of the bill have come to the solicitor's hands, in order to ascertain whether the bill has been paid; and this includes all sums received by him in his character of solicitor. (*Cooper* v. *Ewart*, 2 Phil. 362; 16 L. J. 417; see also *Re Smith*, 9 Beav. 182; 15 L. J. 238.)

Those payments only which are made in performance of professional duties and in a professional character ought to be allowed as disbursements in a bill of costs. (*Re Remnant*, 18 L. J. 374.)

Under the common order to tax, the taxing masters can tax a bill for parliamentary business upon the scale of parliamentary allowances. (*Re Sudlow*, 18 L. J. 182.)

Pending an action by the solicitor, the party contesting the retainer obtained an order of course to tax, which order did not contain a submission to pay what should be found due; and upon motion to discharge that order, it was held that a special application should have been made, when an order would have been granted according to the circumstances of the case. (*Re Thurgood*, 18 Jur. 821.)

A bill of fees claimed by a solicitor as steward of a manor is not within the act. (*Allen* v. *Aldridge, In re Ward*, 5 Beav. 401; 13 L. J. 155; 8 Jur. 435.) A bill for procuring satisfaction to be entered upon a bond for malt duties is taxable in this court. (*Re Gaitskell*, 1 Phil. 576; 14 L. J. 450; 9 Jur. 909.) So is a bill for business done by a solicitor for a member of parliament in attending the court of a revising barrister. (*Re Andrew*, 17 Jur. 1145.)

This court will order the taxation of the bill of costs of a country solicitor's agent (*Jones* v. *Roberts*, 8 Sim. 397); also a bill filed by a country solicitor against his law agents for such costs was dismissed, as such account might have been obtained under the common order for taxation (*Harvey* v. *Mayhew*, 2 Weekly Rep. 128.) A special agreement as to certain items in a bill does not oust the jurisdiction of the court (*Re Eyre*, 10 Beav. 569; 2 Phil. 367); but where the agreement extends to the whole bill, the act does not apply. (*Re Rhodes*, 8 Beav. 224; 14 L. J. 97; 8 Jur. 1109; see also *Re Whitcombe*, 8 Beav. 140; *Re Thompson*, 8 Beav. 237; *Re Moss*, 17 Beav. 59.)

Taxation after One Month.

In case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent or left, or

upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper. (Sect. 37.) See *Re Barnard* and *Re Hair*, post, pp. 339, 340.

The application need not be to the judge who heard the cause. (*Robins* v. *Mills*, 1 Beav. 227; but see *Re Howard*, 8 Beav. 424.) If made after one month from delivery and before twelve months, it may be ex parte. (*Re Gaitskell*, 1 Phil. 576; 14 L. J. 450; 9 Jur. 909; see also *Re Pender*, 2 Phil. 69; *Re Becke* and *Flower*, 5 Beav. 406; 13 L. J. 157; 8 Jur. 505.) Special circumstances must not be concealed on obtaining an order of course, otherwise it will be discharged. (*Re Holland*, 23 L. T. 203.)

Taxation after Twelve Months, under special Circumstances.

No such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made. (Sect. 37.)

The court has no jurisdiction after judgment in an action. (*Re Barnard*, 2 De G., M. & G. 359; 17 Jur. 53; *Re Becke* and *Flower*, supra.) But upon an action against three partners, and judgment by default against one of them, the court may direct a taxation at the instance of the other two

partners. (*Re Hair*, 10 Beav. 187; 16 L. J. 163; 11 Jur. 139.)

The application is considered as made, at the latest, at the time of answering the petition, and not at the time of service or the day appointed for hearing. (*Sayer* v. *Wagstaff*, 5 Beav. 415; 13 L. J. 161; 8 Jur. 1083.)

Upon every such reference, if either the attorney or solicitor, or executor, administrator or assignee of the attorney or solicitor, whose bill shall have been delivered, sent or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand ex parte. (Sect. 37.)

Costs of Taxation.

In case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent or left, then such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent or left, then the party chargeable with such bill, making such application or so attending, shall pay such costs; and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, in respect of such bill and de-

mand, and of the costs of such reference, if payable: provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation: provided also, that where such reference as aforesaid shall be made when the same is not authorized to be made except under special circumstances, as hereinbefore provided, then the said court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference. (Ibid.)

Courts may order Attorney or Solicitor to deliver his Bill, and to deliver up Deeds, &c.

It shall be lawful for the said respective courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents or papers in his possession, custody or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such courts or judges respectively, where any such business had been transacted in the court in which such order was made. (Ibid.)

This order may also be obtained on petition of course at the Rolls, whether for delivery of the bill or for delivery of deeds, &c. after payment. (See *Re Mills*, 1 De G. & S. 643; 12 Jur. 129; 17 L. J. 102.)

A solicitor is bound by the bill he delivers, and he is not entitled as of course to reduce his demand, or add to the charges. (*Re Carven*, 8 Beav. 436; 14 L. J. 372; *Re Wells*, 8 Beav. 416; 9 Jur. 820.)

If the solicitor fails to deliver his bill pursuant to the

order, a four day order may be obtained against him. But it must appear that the previous order has been personally served. (*Re Wisewold,* 16 Beav. 357.)

Evidence of Delivery of Bill — Power to Judge to authorize Action before expiration of Month.

It shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent or left was not such a bill as constituted a bonâ fide compliance with this act: provided also, that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England. (Sect. 37.)

Bills may be taxed upon the Application of Third Parties.

By the 38th section it is enacted, that where any person, *not the party chargeable* with any such bill within the meaning of the provisions hereinbefore contained, *shall be liable to pay or shall have paid* such bill either to the attorney or solicitor, his executor, administrator or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall

be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application.

Third parties liable to pay may, under ordinary circumstances, obtain an order as of course. (*Re Bracey*, 8 Beav. 338; *Re Straford*, 16 Beav. 27.)

Lord Chancellor may direct Taxation of Bills chargeable on Executors, &c.

By the 39th section it is enacted, that it shall be lawful, in any case in which a trustee, executor or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit, *upon the application of a person interested in the property* out of which such trustee, executor or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such directions and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference, to or by such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same

shall be applicable to such cases, and in exercising such discretion as aforesaid the said judge may take into consideration the extent and nature of the interest of the party making the application: provided always, that where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, it shall be lawful for such judge, if he shall think fit, to order the same, or any part thereof, to be paid to such trustee, executor or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, in respect of such bill, he shall have the same right to be paid by such trustee, executor or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, had.

The application of third parties under this section must be special. (*Re Straford*, 16 Beav. 27.)

Copy of Bill to be delivered to Person making Application for Reference for Taxation.

By the 40th section it is enacted, that for the purpose of any such reference, upon the application of the person not being the party chargeable within the meaning of the provisions of this act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such court or judge to order any such attorney or solicitor, or the executor, administrator or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy.

No Re-taxation.

Provided always, that no bill which shall have been previously taxed and settled shall be again referred, unless, under special circumstances, the court or judge to whom

such application is made shall think fit to direct a retaxation thereof.

Taxation of Bill after Payment.

By the 41st section it is enacted, that the payment of any such bill as aforesaid shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment.

A mortgage security by the client to his solicitor for the amount of his bill amounts to a payment. (*Re Boyle*, 23 L. T. 262.) Payment by an acceptance was held a binding payment, so as to exclude taxation, without special circumstances (*Re Currie*, 9 Beav. 602; 10 Jur. 976: see also *Re Harper* and *Jones*, 10 Beav. 284); but the payment dates only from payment of a promissory note so given, and not from the day when it is given. (*Sayer* v. *Wagstaff*, 5 Beav. 415; 8 Jur. 1083.)

After payment of a bill, the court was in the habit of requiring that there should be either pressure or overcharge. (*Re Harding*, 10 Beav. 250; 16 L. J. 288; *Re Clement* and *Newman*, 8 Jur. 327; see also *Re Wells*, 8 Beav. 416; 14 L. J. 215; 9 Jur. 820.) But it has since been held to be the rule of the court that there must either be both overcharge and pressure, or overcharge so gross as to amount to fraud, and that the cases of taxation after payment on the ground of pressure are not to be extended. (*Massie* v. *Drake*, 4 Beav. 433; *Re Hubbard*, 15 Beav. 251.) Where the bill was delivered nearly three weeks before the day of settlement, protest at the time of payment was insufficient to authorize a taxation. (*Re Harrison*, 10 Beav. 57; 16 L. J. 170; 11 Jur. 197.) Alleged overcharges should be clearly

and specifically made out. (*Re Hubbard*, supra: see also *Re Thompson*, 8 Beav. 237; 14 L. J. 137; 9 Jur. 169; *Barwell* v. *Brooks*, 7 Beav. 345.) The court cannot, in any case whatever, direct taxation as against the solicitor after the bill has been paid twelve months; but it may direct a taxation as between a trustee and his cestui que trust, to justify the payment of the former. (*Re Downes*, 5 Beav. 425; 13 L. J. 159: see also *Re Massey*, 8 Beav. 458; *Re Harper* and *Jones*, 10 Beav. 284.) Where there were charges for a whole class of business done, which the solicitor should not have advised, and should not have been done at all, such items are within the term "fraud," and a taxation may be had, if application be made with due diligence. (*Re Barrow*, 22 L. T. 217.) It may be stated that the principle that a paid bill cannot be taxed unless there is fraud or misconduct has been dissented from by the Court of Exchequer. (*Re Dearden*, 17 Jur. 993; 22 L. T. 90.)

Power for Taxing Officer to request Officers of other Courts to tax portions of the Bill.

By the 42nd section it is enacted, that in all cases in which such bill shall have been referred to be taxed and settled, the officer to whom such reference is made shall be at liberty to request the proper officer of any other court having such an officer to assist him in taxing and settling any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers and may receive the same fees in respect thereof as upon a reference to him by the court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same; and the officer to whom such reference is made shall not be paid any fee for that portion of the bill which shall been so taxed and settled by the officer of such other court at his request.

Applications for Taxing Bill of Costs, how to be made.

By the 43rd section it is enacted, that all applications made under this act to refer to any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents and papers, shall be made in the matter of such attorney or solicitor.

Certificate of Taxation to be final.

Upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree or rule of court), be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the court in which such reference shall be made. (Ibid.)

Judgment may be entered.

In case such reference shall be made in any Court of Common Law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper. (Ibid.)

Except when the order is made in the matter of the solicitor, and not in a cause, payment of the balance may be enforced as in other cases (see "*Enforcing Decree or Order*," ante); but when made in the matter of the solicitor, and not in a cause, it would appear that the old practice must be resorted to, whether for payment of the balance, or for delivery of papers (*Re Lovell*, 9 Beav. 332; *Re Taylor*, 10 Beav. 221), viz., service of a copy of the taxing master's certificate personally upon the party against whom the balance is found to be due, at the same time producing the office copy and demanding payment. The demand should be by the person entitled or his duly appointed attorney under power. Upon affidavit thereof and of non-payment an order will be granted directing payment within a limited

time; and upon a further affidavit of service of that order personally, and a further demand and non-payment, the court will, upon a motion with notice served personally, order payment within four days or committal; and upon a further affidavit of personal service of this order, and of a further demand and non-payment, an absolute order of committal will be made.

See further "*Taxation of Costs*," infra.

GENERAL RULES, &c.

Besides the General Orders, regulations and decisions referred to, infra, under the heading "*Taxation of Costs*," the following, which for convenience of reference are arranged under separate headings, and in alphabetical order, are now operative as part of the practice of the court.

Adjournment of Cause.—By the 34th General Order, 3rd April, 1828, it is provided, that when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties or other defect on the part of the plaintiff, and is therefore struck out of the paper; if the same cause is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit.

By the 35th ibid., that where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the Lord High Chancellor, the Master of the Rolls, or the Vice-Chancellor, shall pay the sum of ten pounds, unless the court shall make other order to the contrary.

By the 36th ibid., that whenever, upon the hearing of any cause or other matter, it shall appear that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court, and which

according to its practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award.

Administration and other Suits.—In certain administration suits and suits for the execution of the trusts of deeds or instruments, or for the protection of property pending litigation, and in cases in the nature of waste, the court may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question. (15 & 16 Vict. c. 86, s. 42, r. 7.)

In a suit by a simple contract creditor, though the assets prove insufficient to satisfy the specialty debts, the plaintiff is nevertheless entitled to have costs out of the estate, and that as between solicitor and client. (*Jenkins* v. *Robertson*, 22 L. J. 874.)

So, in a legatee's suit, where the fund is insufficient to pay the legacies in full, the plaintiff will have his costs as between solicitor and client. (*Waldron* v. *Frances*, 10 Hare, App., 10.)

Costs of administration in this court have priority over costs of litigation in the ecclesiastical courts for determining which is the testator's will, although ordered by that court to be paid out of the estate. (*Major* v. *Major*, 2 Drewry, 181.)

Answers.—By the 27th General Order, 3rd April, 1828, it is provided, that where the same solicitor is employed for two or more defendants, and separate answers shall have been filed, or other proceedings had by or for two or more defendants separately, the master shall consider in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion that any part of the costs occasioned

thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

By the 28th ibid., where a plaintiff obtains a decree with costs, there the costs occasioned to the plaintiff by the insufficiency of the answer of any defendant shall be deemed to be part of the plaintiff's costs in the cause, such sum or sums being deducted therefrom as were paid by the defendant, according to the course of the court, upon the exceptions to the said answer being submitted to or allowed.

By the 29th General Order, 26th August, 1841, it is provided, that where no account, payment, conveyance or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill, and the costs of all proceedings consequential thereon, shall be paid by the plaintiff, unless the court shall otherwise direct.

By the 22nd General Order, 2nd Nov. 1850, it is provided, that upon a third answer being held to be insufficient, the court may order the defendant to be examined upon interrogatories to the points held to be insufficient, and to stand committed until he shall have perfectly answered the interrogatories; and the defendant is to pay such costs as the court shall think fit to award.

By the 24th ibid., where any person or party having filed exceptions to any pleading or other matter depending before the court for scandal, and any person or party having filed such exceptions for impertinence, does not set the same down for hearing within six days after the filing thereof, such exceptions are to be considered as abandoned, and the person or party by whom such exceptions were filed is to pay to the opposite party such costs as may have been incurred by such party, in respect of such exceptions.

Appeal and Rehearing.—By the 42nd General Order of the 3rd of April, 1828, it is provided, that the deposit upon

every petition of appeal or rehearing be increased to 20*l.*, to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the court shall otherwise order.

When a judgment of the House of Lords on appeal from this court has been made an order of this court, which may be done on motion, the costs certified by the officer of the House as payable will be ordered to be paid on motion with notice, without interest or costs of the application; but a writ of fi. fa. was refused on ex parte application. (*Man* v. *Ricketts*, 2 De G. & S. 446.)

Bill.—By the 29th General Order, 3rd April, 1828, it is provided, that where the plaintiff is directed to pay to the defendant the costs of the suit, there the costs occasioned to a defendant by any amendment of the bill shall be deemed to be part of such defendant's costs in the cause, (except as to any amendment which may have been made by special leave of the court, or which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum or sums which may have been paid by the plaintiff, according to the course of the court, at the time of any amendment.

By the 30th ibid. it is provided, that when upon taxation a plaintiff who has obtained a decree with costs is not allowed the costs of any amendment of the bill, upon the ground of its having been unnecessarily made, the defendant's costs, occasioned by such amendment, shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

By the 2nd General Order, 7th August, 1852 (A), it is provided, that no costs are to be allowed, either as between party and party, or as between solicitor and client, for any written bill or written copy of a bill, filed under the 15 & 16 Vict. c. 86, s. 6, or for any written copy thereof, served upon

any defendant thereto, or for any written brief of such bill, unless the court shall, in disposing of the costs of the cause, direct the allowance thereof.

By the 3rd ibid. it is provided, that the clerks of records and writs shall, at the expiration of fourteen days from the filing of any written bill or written copy of a bill, take off the files of the court, without further order, the bill or copy so filed, unless a printed copy thereof shall in the meantime have been filed, and the plaintiff in the suit or his solicitor, who shall personally have undertaken to file such printed copy, shall pay to the defendant all the costs incurred by him in the suit, such costs to be taxed by the taxing master, without further order, upon production to him of the certificate of the clerk of records and writs, that a printed copy of the bill has not been filed pursuant to such undertaking, and to be recoverable in like manner as costs ordered to be paid by a party in a suit to another party in a suit are now recoverable.

Bill instead of Claim.—By the 32nd General Order, 22nd April, 1850, it is provided, that if, at any time after these orders come into operation, any suit for any of the purposes to which the forms set forth in Schedule A. are applicable, shall be commenced by bill and prosecuted to a hearing in the usual course, and upon the hearing, it shall appear to the court, that an order to the effect of the decree then made, or an order equally beneficial to the plaintiff, might have been obtained upon a proceeding by summons in the manner authorized by these orders, the court may order that the increased costs which have been occasioned by the proceeding by bill, beyond the amount of costs which would have been sustained in the proceeding by summons, shall be borne and paid by the plaintiff.

Chambers.—By the 55th General Order of the 16th of October, 1852, it is provided, that parties attending any proceeding in chambers, without having obtained the previous

leave of the judge to attend the same, are not to be allowed any costs of such attendance, unless by special order of the court.

[See also "*Counsel.*"]

Claim—See "*Suits by Claim.*"

Copies of Pleadings, &c.—See this title, infra.

Counsel.—By the 33rd General Order of the 3rd of April, 1828, it is provided, that when two counsel appear for the same party or parties upon the hearing of any cause or matters, and it shall appear to the master to have been necessary or proper for such party or parties to retain two counsel to appear, the costs occasioned thereby shall be allowed, although both of such counsel may have been selected from the outer bar.

By the 10th General Order of the 3rd of June, 1850, it is provided, that in all proceedings before the master, where he is attended by counsel, the allowances, on the taxation of costs, in respect of the fees to such counsel, are to be regulated upon the same principle as if the proceedings were before the court.

By the 11th ibid., the costs of procuring the attendance of counsel before the master are to be allowed, in the taxation of costs as between party and party, in all cases in which the master shall certify such attendance to be proper, and in no other case.

By the 56th General Order of the 16th of October, 1852, it is provided, that the costs of counsel attending the judge in chambers are not in any case to be allowed, unless the judge certifies it to be a proper case for counsel to attend.

[See also "*Taxation of Costs.*"]

Creditors.—By the 47th General Order, 26th August, 1841, as amended by the Orders of 11th April, 1842, it is provided, that a creditor, who has come in and established his debt before the master, under a decree or order in a suit,

shall be entitled to the costs of so establishing his debt; and the sum to be allowed for such costs shall be fixed by the master without taxation, at the time the master allows the debt of such creditor, unless the master shall think that such costs ought to be taxed in the regular mode, in which case the same shall be so taxed by the master, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established.

When a creditor's claim is successfully resisted in chambers, the costs of resisting it must be paid by the claimant, even though he was prevented by injunction from pleading at law. (*Re Searles, Hatch* v. *Searles*, 22 L. T. 315.)

Demurrer and Plea—See "*Plea and Demurrer.*"

Depositions, Immaterial or Irrelevant.—By the 15 & 16 Vict. c. 86, s. 32, the court has power to deal with the costs of immaterial or irrelevant depositions as may be just.

Disposal of Causes, &c.—By the 15 & 16 Vict. c. 80, s. 8, it is provided, that in case the master shall be unable, by reason of the conduct of parties, or otherwise, to finally dispose of any cause, matter or thing, he shall be at liberty to dispose of any part thereof within his power, and to report or certify on the whole of the case; and upon such report or certificate the court shall make such order as it shall think proper on all or any of the parties, for the further prosecution of the suit or matter, or for the final disposal thereof, and for the payment of the costs thereof, including any of the costs which may have been incurred by reason of the conduct of the parties.

By the 9th section of the same act, in the event of the parties in any cause, matter or thing, or their solicitors, refusing or neglecting, within a time to be fixed by the master, to bring the master's report or certificate before the court, the same may, by direction of the master, be brought before the court by the solicitor for the time being to the suitors' fund; and the court is thereby empowered to order

payment of the costs and expenses of the solicitor to the suitors' fund out of such of the funds in the cause, matter or thing, or by such parties, as to the court shall seem just; and in case payment thereof cannot be obtained by any of the means aforesaid, the same, by the direction of the court, may be paid out of the suitors' fund.

Exceptions to Master's Report.—By the 41st General Order, 3rd April, 1828, it is provided, that the deposit upon exceptions to a master's report shall be increased to 10*l.*, to be paid to the adverse party if the exceptions are overruled; in which case the exceptant shall also pay the further taxed costs occasioned by such exceptions, unless the court shall otherwise order; but in case the exceptant shall in part succeed, the deposit shall be dealt with and costs shall be paid as the court shall direct.

Gross Sum for Costs.—By the 123rd General Order of the 8th of May, 1845, it is provided, that upon interlocutory applications, where the court deems it proper to award costs to either party, the court may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid.

Heir-at-Law.—An heir-at-law who disputes a will on the ground of insanity was, on failing, allowed the costs of the issue at law, it not appearing that he had improperly or dishonestly raised the issue. (*Waters* v. *Waters*, 23 L. T. 242.)

Impertinent Matter.—By the 15 & 16 Vict. c. 86, s. 17, it is provided, that the practice of excepting to bills, answers and other proceedings in the said court for impertinence shall be and the same is thereby abolished; provided always, that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the said court to be paid by the party introducing the same, upon application being made to the court for that purpose.

By the 30th General Order of the 7th of August, 1852, (A), it is provided, that the application to be made for the costs of any impertinent matter introduced into any bill, answer or other proceeding is to be made at the time when the court disposes of the costs of the cause or matter, and not at any other time.

Impertinent or Unnecessary Matter.—By the 122nd General Order of the 8th of May, 1845, it is provided, that if upon the hearing of any cause, petition or motion the court is of opinion that any pleading, petition or affidavit which has not been referred for impertinence, or any part of any such pleading, petition or affidavit, is improper or of unnecessary length, the court may either declare such pleading, petition or affidavit, or any part thereof, to be improper or of unnecessary length, or may direct the taxing master to look into such pleading, petition or affidavit, and distinguish what parts or part thereof are or is improper or of unnecessary length, and may direct the taxing master to ascertain the costs occasioned to any party by such parts or part thereof as in the one case may have been declared to be, and in the other case may have been distinguished as being improper or of unnecessary length, and may make such order as is just for the payment, set-off, or other allowance of such costs.

Masters' Office.—By the 54th General Order of the 3rd of April, 1828, it is provided, that where the master has proceeded ex parte, such proceeding shall not in any manner be reviewed in the master's office, unless the master, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; such costs to be certified by the master at the time, and paid by the party or his solicitor before he shall be permitted to proceed on the warrant to review.

By the 55th ibid., where a proceeding fails, by reason of the non-attendance of any party or parties, and the master does not think it expedient to proceed ex parte, there the master shall be at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors, or clerk or clerks in court personally, as the master in his discretion shall think fit; and upon motion or petition, without notice, the court will make order for the payment of such costs accordingly.

By the 68th ibid., no warrant to review any proceeding in the master's office shall be allowed to be taken out, except by permission of the master, upon special grounds to be shown to him for that purpose; and the costs of such review when allowed shall be in the discretion of the master, and shall be paid by and to such persons and at such time as he shall direct.

By the 70th ibid., in all matters referred to him, the master shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the court.

By the 2nd General Order of the 3rd of June, 1850, it is provided, that if, upon the warrant taken out for considering the decree or order of reference, or at any time during the reference, it shall appear to the master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he is to be at liberty to require the persons constituting each or any class to be represented by the same solicitor; and if the parties constituting such class cannot agree upon the solicitor to represent them, the master is to be at liberty to nominate such solicitor for the purpose of the proceedings before him; and if any of the parties constituting such class shall decline to authorize the solicitor so nominated to act for him, and shall insist upon being represented by a different solicitor, such

party shall personally pay the costs of his own solicitor of and relating to the proceedings before the master with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated.

By the 7th ibid., the master's power to award costs, in case of the non-attendance of any party upon any warrant, is to extend to the case of his non-attendance upon any adjournment of any warrant to a fixed time.

By the 8th ibid., in all cases, when a proceeding has been unduly delayed, by reason of the neglect of any party or his solicitor, the master shall, in the first report which he shall make on the subject-matter in respect of which such proceeding has been unduly delayed, state specially to the court the circumstances of such delay, in order that the court may, if it shall so think fit, in addition to and notwithstanding any costs which the master may have certified to be paid in the course of the proceedings before him, make such further order in respect thereof as justice shall require.

By the 9th ibid., if it shall appear to the master, that any state of facts, affidavit or other proceeding before him, contains statements which are impertinent or of unnecessary length, he shall be at liberty (without any application made to him for the purpose) to disallow such matter, distinguishing by his initials in the margin the parts so disallowed; and he shall cause a memorandum of his having disallowed such impertinent matter to be indorsed on the office copies of the draft of his report as to the particular inquiry on which such state of facts, affidavit or other proceeding shall have been used before him; and in the taxation of costs, no costs shall be allowed to the parties by or on whose behalf such state of facts, affidavit or other proceeding was brought into the Master's Office, for or in respect of the matter so disallowed, and the taxing master shall allow to the other parties to the suit or matter all such costs as have been in-

curred by or occasioned to them by reason of the matter so disallowed; and such costs shall be paid by the party by or on whose behalf such state of facts, affidavit or other proceeding was so brought in.

See also "*Counsel*," ante, p. 353.

Misjoinder of Plaintiffs.—Costs in discretion of the court. (15 & 16 Vict. c. 86, s. 49.)

Mistake of Parties.—By the 15 & 16 Vict. c. 86, s. 60, it is provided, that in case any of the directions herein contained with respect to the practice and course of proceeding in the said Court of Chancery shall by mistake of parties fail to be followed in any suit or proceeding in the said court, it shall be lawful for the said court, if it shall think fit, upon payment of such costs as the court shall direct, to make such order giving effect to and rectifying such proceedings as may be justified by the merits of the case.

Motion for Decree or Decretal Order.—By the 15 & 16 Vict. c. 86, s. 16, it is provided, that upon any such motion for a decree or decretal order it shall be discretionary with the court to grant or refuse the motion, or to make an order giving such directions for or with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.

By the 25th General Order of the 7th of August, 1852, (A), it is provided, that within seven days after the expiration of such fourteen days, the plaintiff is to file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and he is to furnish the defendant or his solicitor with a list thereof; and except so far as these affidavits are in reply, they are not to be regarded by the court, unless, upon the hearing of the motion, the court shall give leave to the defendant to answer them, and in that case, the costs of such affidavits and of the further affidavits consequent

upon them shall be paid by the plaintiff, unless the court shall otherwise order.

Plea and Demurrer.—By the 32nd General Order of April, 1828, it is provided, that upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the court shall make other order to the contrary.

A witness on his demurrer being overruled was held liable to pay the same costs as a defendant under this order. (*Sawyer* v. *Birchmore*, 3 Myl. & K. 578.) Where a demurrer ore tenus is allowed, but the demurrer on record is overruled, the defendant must pay the taxed costs of the latter. (*Mortimer* v. *Frazer*, 2 Myl. & Cr. 173.)

By the 15 & 16 Vict. c. 86, ss. 32 and 33, the costs of immaterial or irrelevant depositions and the costs of and occasioned by the demurring or objections of witnesses to questions are in the discretion of the court.

By the 45th General Order, 8th May, 1845, it is provided, that where a demurrer to the whole or part of a bill is allowed upon argument, the plaintiff, unless the court orders to the contrary, is to pay to the demurring party the costs of the demurrer, and if the demurrer be to the whole bill the costs of the suit also.

By the 46th ibid. it is provided, that where a demurrer to the whole bill is not set down for argument within twelve days after the filing thereof, and the plaintiff does not, within such twelve days, serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent and for the same purposes, and the plaintiff is to pay to the demurring party the same costs as in the case of a demurrer to the whole bill allowed upon argument.

By the 47th ibid., where a demurrer to part of a bill is not set down for argument within three weeks after the filing thereof, and the plaintiff does not, within such three

weeks, serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent and for the same purposes, and the plaintiff is to pay to the demurring party the same costs, as in the case of a demurrer to part of a bill allowed upon argument.

By the 48th ibid., where a plea to the whole or part of a bill is allowed upon argument, the plaintiff, unless he undertakes to reply to the plea, or the court orders to the contrary, is to pay to the party by whom the plea is filed the costs of the plea, and if the plea be to the whole bill, the costs of the suit also; and in such last-mentioned case, the order allowing the plea is to direct the dismissal of the bill.

By the 49th ibid., where a plea to the whole or part of a bill is not set down for argument within three weeks after the filing thereof, and the plaintiff does not, within such three weeks, serve an order for leave to amend the bill, or does not, within such three weeks, by notice in writing, undertake to reply to the plea, the plea is to be held good, to the same extent and for the same purposes, and the same costs are to be paid by the plaintiff, as in the case of a plea to the whole or part of a bill allowed upon argument; and where the plea is to the whole bill, the defendant by whom such plea was filed may, at any time after the expiration of such three weeks, obtain as of course an order to dismiss the bill.

Recovery of Costs — See ante, "*Enforcing Decree or Order*," pp. 259—266.

Security for Costs.—By the 40th General Order of the 3rd of April, 1828, it is provided, that the penal sum in the bond to be given as a security to answer the costs by any plaintiff who is out of the jurisdiction of the court, be increased from 40*l.* to 100*l.*

By the 6th General Order of the 26th of October, 1842, it is provided, that in cases where security for costs has heretofore been directed to be given to a six clerk, such security

shall be directed to be given to the clerk of records and writs in whose division the cause is.

By the 15th General Order of the 8th of May, 1845, it is provided, that the day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to plead, answer or demur.

Under the 40th Order above mentioned, the amount of the security is increased in all cases, whether the plaintiff absconds or wilfully gives a fictitious address (*Bailey* v. *Gundry*, 1 Keen. 53; *Sandys* v. *Long*, 2 Myl. & K. 487); but not if innocently done. (*Simpson* v. *Burton*, 1 Beav. 556; *Smith* v. *Cornfoot*, 1 De G. & S. 684; 12 Jur. 260.) The rule extends to a peer out of the jurisdiction (*Lord Aldborough* v. *Burton*, 2 My. & K. 401), and to an officer residing abroad, unless it is distinctly stated in the bill that he is on actual service (*Lillie* v. *Lillie*, 2 My. & K. 404; see also *Evelyn* v. *Chippendale*, 9 Sim. 497); and a defendant to a bill of interpleader. (*Smith* v. *Hammond*, 6 Sim. 15.) Where a defendant obtained leave to have the conduct of the cause, he residing out of the jurisdiction, he was ordered to give security. (*Mynn* v. *Hart*, 9 Jur. 860.) A next friend cannot be compelled to give security for costs on the mere ground of poverty; but in charity cases the relator, if shown to be in indigent circumstances, will not be allowed to sue (*Fellows* v. *Barrett*, 1 Keen. 119); and if the next friend is permanently residing abroad, he must give security. (*Alcock* v. *Alcock*, 5 De G. & S. 671.)

If the plaintiff has no fixed residence, he is liable to give security. (*Player* v. *Anderson*, 15 Sim. 104; 10 Jur. 169.) So, where there is vagueness in the description, as where the plaintiff describes himself as working on a specified line of railway. (*Sibbering* v. *Earl Balcarras*, 1 De G. & S. 683; 17 L. J. 102; 12 Jur. 108.) But where the plaintiff described himself as of "Her Majesty's Theatre," in the

county of Middlesex, the court refused to order security. (*Lumley* v. *Hughes*, 22 L. T. 197; see also *Hurst* v. *Padwick*, 12 Jur. 21.) Where the plaintiff resided in England temporarily, and described himself as of Scotland, but now residing in "Aldersgate Street, in the city of London," where he had engaged lodgings not for any fixed period, he was ordered to give security. (*Ainslie* v. *Sims*, 17 Jur. 657; 22 L. J. 834.) So, if the plaintiff, not being on public service, goes abroad pending a suit, and remains there under circumstances rendering it probable he will not be forthcoming when called upon to pay costs. (*Blakeney* v. *Dufaur*, 2 De G., M. & G. 771; 17 Jur. 98; 22 L. J. 389.) When there are several plaintiffs, and one is within the jurisdiction, defendant is not entitled to security. (*Walker* v. *Easterby*, 6 Ves. 611.) Nor is a defendant to a cross suit bound to give security to the plaintiff in the original suit. (*Vincent* v. *Hunter*, 5 Hare, 320.) And the same exemption applies to a suit based upon an action at law. (*Watteeu* v. *Billam*, 18 L. J. 455.) Security may be required in the case of a petition to tax a solicitor's bill. (*Ex parte Seidler*, 12 Sim. 106; *Re Dolman*, 11 Jur. 1095.) And a married woman who had obtained an order to tax a solicitor's bill, without a next friend, was ordered to give security for the costs of the order and taxation, or the order to be discharged. (*Re Waugh*, 15 Beav. 508; 21 L. J. 567.) The application must be made without delay and without taking any step in the cause after appearance. (*Craig* v. *Bolton*, 2 Bro. C. C. 608.)

The order may be obtained either on motion with notice, or as of course, according to the nature of the case. If the fact of the residence abroad appears upon the bill, an order of course should be obtained by motion or petition. If the necessary facts do not appear, there must be a notice of motion, and the application must be supported by evidence of those facts. The order is served on the plaintiff's solicitor, who then informs the defendant's solicitor of the name and

residence of the proposed surety; and if no objection is raised to the person proposed, the bond may be prepared in the following form:—

Bond Security for Costs.

Know all men by these presents, that we A. B., of ——, and C. D., of ——, jointly and severally are held and firmly bound to ——, Esq., one of the record and writ clerks of the High Court of Chancery, in the sum of one hundred pounds of good and lawful money of Great Britain, to be paid to the said —— or his certain attorney, executors, administrators or assigns, for which payment to be well and faithfully made we bind ourselves, our heirs, executors and administrators, and each of us doth bind himself, his heirs, executors and administrators, firmly by these presents, sealed with our seals. Dated this —— day of ——, in the —— year of the reign of our sovereign lady, Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord one thousand eight hundred and fifty-four.

Whereas E. F. has lately exhibited his bill of complaint in her majesty's High Court of Chancery against G. H. and J. T. touching the matters therein contained: Now the condition of this obligation is such that if the above-bounden A. B. and C. D., or either of them, their or either of their heirs, executors or administrators, do and shall well and truly pay, or cause to be paid, all such costs, if any, as the said court shall think fit to award to be paid by the said plaintiff to the said defendants on the hearing of the said cause or otherwise, then this obligation to be void, or else to be and remain in full force and virtue.

It is usual and better to name two sureties, but one is sufficient. Each defendant is entitled to security, but the plaintiff may voluntarily include all in one bond for 100*l.* If, however, he does not do so, he may be called upon by the other defendants for further bonds. However many bonds are given they do not increase the liability, being collateral to each other. (*Lowndes* v. *Robertson*, 4 Madd. 465.) If objected to, the plaintiff's solicitor will be rejected as surety. (*Panton* v. *Labertouche*, 1 Phil. 265; 12 L. J. 436; 7 Jur. 589.) But a guarantee society is unobjectionable. (*Plestow* v. *Johnson*, 22 L. T. 74.) The bond, when completed, is filed by the record and writ clerk, and notice thereof given to the defendant's solicitor.

When the plaintiff fails to give the security ordered, the defendant may move that he do so within a specified time, or that the bill be dismissed. (*Camac* v. *Grant*, 1 Sim. 348; *Giddings* v. *Giddings*, 10 Beav. 29; 16 L. J. 183; 11 Jur. 549.) But he may, if he prefers it, pay 120*l.* into court in lieu of giving the usual security. (*Cliffe* v. *Wilkinson*, 4 Sim. 122.)

Solicitor.—If a solicitor files a claim without the plaintiff's authority, it will on motion be dismissed, and the solicitor will be ordered to pay the costs of the plaintiffs and defendants, including the costs of the motion as between solicitor and client. (*Crossley* v. *Crowther*, 21 L. J. 565; 18 L. T. 181; see also *Wright* v. *Castle*, 3 Mer. 12; *Wiggins* v. *Pepper*, 2 Beav. 403; *Allen* v. *Bone*, 4 Beav. 493.) But when the court is not satisfied as to the want of authority, the costs of the motion at least must probably be paid by the plaintiff. (See *Evans* v. *Kinsey*, 21 L. T. 178.)

Suits by Claim.—By the 15th General Order of the 22nd of April, 1850, it is provided, that if, upon the application for any order upon a claim, or during any proceedings under any such order when made, it shall appear to the court, that for the purposes of justice between the parties, it is necessary or expedient that a bill should be filed, the court may direct or authorize such bill to be filed, subject to such terms as to costs or otherwise as may be thought proper.

By the 32nd ibid., if, at any time after such general orders come into operation, any suit for any of the purposes to which the forms set forth in schedule (A) are applicable, shall be commenced by bill and prosecuted to a hearing in the usual course, and, upon the hearing, it shall appear to the court, that an order to the effect of the decree then made, or an order equally beneficial to the plaintiff, might have been obtained upon a proceeding by summons in the manner authorized by such orders, the court may order that the increased costs which have been occasioned by the proceed-

ing by bill, beyond the amount of costs which would have been sustained in the proceeding by summons, shall be borne and paid by the plaintiff.

The costs of a motion by a defendant to take off the file a claim, for the filing of which leave ought to have been obtained, must be paid by the plaintiff. (*Matthews* v. *Pincomb*, 20 L. J. 395; 17 L. T. 301.)

If, without consent, a party procures a claim to be marked short, it is at his risk of having to pay costs to the opposite party if the claim should prove not to be a short one. (*Bower* v. *Cunningham*, 17 L. T. 59; see also *Waldron* v. *Sloper*, 17 L. T. 15; 15 Jur. 187; and *Hills* v. *Treacher*, 15 Jur. 267.)

Taxing Master's Powers and Duties.—By the 9th General Order of the 26th October, 1842, it is provided, that the taxing masters shall perform all such duties as have theretofore been referred to or performed by the masters in ordinary in relation to the taxation of costs; and shall, in respect thereof, have all such powers and authorities as were then vested in the masters in ordinary.

To administer oaths.

To examine witnesses and parties.

To order the production and inspection of books, papers and documents.

To proceed de die in diem.

To make separate reports and certificates.

To require that any party be represented by a separate solicitor.

And to direct and adopt all such other proceedings as may now be directed and adopted by the master in ordinary, on references for the taxation of costs and taking accounts of what is due in respect of such costs, and such other accounts connected therewith, as may be directed by the court.

By the 10th ibid., all references for the taxation of costs shall be made to the taxing master in rotation; or if there

has been any former taxation of costs in the same cause or matter, then to the taxing master before whom such former taxation has taken place, either on a reference from the court, or upon the request of a master in ordinary.

By the 11th ibid., all bills of costs, which, by any existing order, have been referred for taxation to any master in ordinary, who shall not have certified the costs due thereon, before the 28th day of October instant, are hereby transferred to the taxing masters, and shall respectively be taxed by the taxing master in rotation; and if any bills of costs have been proceeded with, before the said 28th day of October instant, the taxing master, by whom the same shall be taxed, shall be at liberty to adopt the whole or such part as he shall think fit, of the proceedings which have taken place before the transfer, and may demand and receive for completing such taxation, such fees as would have been payable in respect thereof, in case such taxation had been continued and completed by the master in ordinary, including therein the fees which, in such case, would have been payable to the clerks in court, for the completion of such taxation, or as near thereto as the circumstances of the case will admit.

By the 12th ibid., in cases where the account of any trustee, executor, administrator, receiver, consignee or committee, shall consist in part of any bill of costs, and in cases of any proceedings under the 22nd or 23rd of the Orders of the 21st December, 1833, or under the 47th of the Orders of the 26th of August, 1841, as amended by the 6th of the Orders of the 11th of April, 1842, and in all other cases where, under any general order, the master in ordinary is at liberty to tax the costs of any proceeding before him, in respect of any exceptions, or any creditor's charge, or otherwise, the master in ordinary to whom it may be referred to take such account, or before whom any such proceeding may take place, shall be at liberty to request the taxing master in rotation, or the taxing master to whom any taxa-

tion in the same cause or matter may have been previously referred, to assist him in taxing and settling such bill of costs, not being the ordinary costs, on passing such account; and the taxing master, on receiving such request, shall proceed to tax such bill, and shall have the same powers, and may receive the same fees in respect thereof, as if the same had been referred to him by the court, and shall return the same, with his opinion thereon, to the master in ordinary at whose request the same was taxed.

By the 13th ibid., if, upon the taxation of any bill of costs, it shall appear to the taxing master that, for the purpose of duly taxing the same, it is necessary to inspect any books, papers or proceedings relating to the cause or matter which shall be in the office of any master in ordinary, the taxing master shall be at liberty to request the master in ordinary having any such book, paper or proceeding in his office, to cause the same to be transmitted to the office of the taxing master; and also to request any master in ordinary to certify any proceedings in his office, which may be comprised in a bill of costs under taxation; and that in such cases the master in ordinary, when, and so soon, and at and for such times as the due transaction of the business in his own office will permit, shall direct such books, papers and documents to be transmitted to the office of the taxing master, for his use during the taxation, and shall certify the proceedings which have taken place in his office, according to the request of the taxing master; and after the costs, in respect of which such request of the taxing master was made, shall have been certified, the taxing master shall cause the same books, papers and documents which have been so transmitted to his office, if then remaining there, to be returned to the office of the master in ordinary by whom they were transmitted, unless it shall appear to the master in ordinary, and also to the taxing master, that any bill of costs, forming part of the papers so transmitted, ought to be retained by the taxing master, in

which case the taxing master shall take charge of such bill of costs, subject to the order of the court.

By the 14th ibid., when any paper or document shall be transmitted from the office of a master in ordinary to the office of a taxing master, an entry of such transmission shall be made in the book of proceedings of the master in ordinary, and shall be signed by the taxing master or the clerk of the taxing master at whose request such paper or document may be transmitted; and when any such paper or document shall be returned from the office of the taxing master to the office of the master in ordinary, an entry of such return shall be made in the said book of proceedings, and be signed by the master in ordinary or his clerk.

By the 15th ibid., the taxing masters are to be respectively assistant to each other; and in the discharge of their duties, and for the better dispatch of the business of their respective offices, any taxing master may tax or assist in the taxation of a bill of costs which has been referred for taxation, and for ascertaining what is due in respect of such costs to any other taxing master, and in such case shall certify accordingly.

By the 30th ibid., so far as regards the taxation and allowance of costs in any of the suits or matters to be transferred in pursuance of the said act, and which shall not, by any order of this court, be directed to be regulated, in that particular, by the late practice of the Court of Exchequer, such costs shall be taxed and allowed in manner following; (that is to say), the costs previously to the said 15th day of October, 1841, shall be taxed and allowed according to the practice of the said Court of Exchequer, and the costs from and inclusive of the said 15th day of October, shall be taxed and allowed according to the practice of this court.

By the 120th General Order of the 8th of May, 1845, it is provided, that where costs are to be taxed as between party and party, the taxing master may allow to the party

entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in

The service and execution of writs, and the service of orders, notices, petitions and warrants,

Advising with counsel on the pleadings, evidence and other proceedings in the cause,

Procuring counsel to settle and sign pleadings and such petitions as may appear to have been proper to be settled by counsel,

Procuring consultations of counsel,

Procuring the attendance of counsel in the master's offices upon questions relating to pleadings or title,

Procuring evidence by deposition or affidavit, and the attendance of witnesses,

and

Supplying counsel with copies of or extracts from necessary documents.

But in allowing such costs the taxing master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, negligence or mistake, or merely at the desire of the party.

By the 121st ibid., the costs of such copies of pleadings and proceedings as have heretofore been allowed in the taxation of costs between party and party in country causes, are hereafter to be allowed in the taxation of costs between party and party in town causes.

By the 124th ibid., in cases where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order ordered or decreed to be paid, the taxing master may tax such costs without any order referring the same for taxation, unless the court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the

costs to be certified by the taxing master are to be recovered by subpœna.

By the 125th ibid., the costs of a bill of discovery filed by any defendant to a bill for relief are to be costs in the original cause, unless the court otherwise orders.

By the 128th ibid., any solicitor, party or person filing an affidavit not taken and expressed in the first person of the deponent is not to be allowed the costs of preparing and filing such affidavit in any taxation of costs.

The form of a subpœna for costs is given at foot of the last-mentioned orders.

By the 11th General Order of the 1st of June, 1854, it is provided, that the expenses incurred in consequence of affidavits being prepared or settled by counsel, are to be allowed only when the taxing masters shall in their discretion, and on consideration of the special circumstances of each case, think such expenses properly incurred; and in such case they are to be at liberty to allow the same or such parts thereof as they may consider just and reasonable, whether the taxation be between solicitor and client or between party and party.

Witnesses.—By the 15 & 16 Vict. c. 86, s. 38, it is provided, that the evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any general order of the Lord Chancellor, but with power to the court to enlarge the same as it may see fit; and after the time fixed for closing the evidence no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the court previously obtained for that purpose: provided always, that any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the

Lord Chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of subpœna ad testificandum before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court shall think fit otherwise to direct.

By the 39th section of the above act it is provided, that upon the hearing of any cause depending in the said court, whether commenced by bill or by claim, the court, if it shall see fit so to do, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit or in such manner as it may think fit.

[See also "*Depositions*" and "*Plea and Demurrer.*"]

TAXATION OF COSTS.

The office of taxing master in this court was created by the 5 & 6 Vict. c. 103. To procure a taxation under an order the course is as follows:—

The solicitor or party having the custody of the decree or order directing the taxation, carries a true copy, certified by himself as such, of the whole, and not as formerly, of the title and mandatory part only, into the taxing master's office. Whether a reference has been already made to a taxing master in the same cause or matter, or not, the reference will

be to the proper taxing master, in which case the solicitor or party prosecuting will write as follows, in the margin of the decree or order, altering the date as may be necessary.

6th June, 1854.

Mr. —— is the proper taxing master, to whom the taxation of costs in this cause [*or* "matter"] is referred.

Sitting Master.

The sitting master, whose name is always affixed against the wall of the entrance hall of the taxing offices, will, on having the decree or order taken to him, fill in the name of the taxing master in rotation, and sign the memorandum of reference, which is to be copied also on the copy decree or order to be left for the master referred to.

In applying for an original reference the solicitor must now also certify in the margin of the order as follows:—

A. *v.* B.

or

In the matter of, &c.

I hereby certify that this cause [*or* "matter"] has not been already referred to any taxing master. Dated the —— day of —— 1854.

E. F.
Plaintiff's Solicitor.

If there has on some previous occasion been a reference for taxation of costs in the same cause or matter, the taxing master who acted then, or his successor, will be the proper person to act throughout such cause or matter, and there need not be any subsequent reference, the decree or order directing the subsequent costs to be taxed by the proper taxing master to whom the taxation of costs in the cause or matter stands referred or transferred, as the case may be. In both cases, however, the copy must be left for the taxing master's guidance, and at the same time the costs of the party leaving it may also be left, and a warrant on leaving taken out and served on such parties as are interested in the result of the taxation.

If any solicitor or party has more than one bill to be taxed, under the same decree or order, he takes but one warrant on leaving the whole, and one to tax the whole. A warrant on leaving and another to tax may be taken out by each party.

It is preferred that no warrant to tax be taken out until all the bills to be taxed under the decree or order are left. Indeed, frequently warrants to tax some of the bills before others were left have been refused, but this is a practice unwarranted by principle and calculated to work great injustice by way of delay and inconvenience to diligent practitioners, who are compelled to wait an indefinite time for the taxation of their bills, because, perhaps, one careless practitioner does not think fit to bring in his bill. It is true a warrant may be taken out professing to compel him to do so or to exclude him, but in fact this rarely answers the object in view, and when it does not, the same difficulty as before mostly exists in inducing the taxing master to issue his certificate.

The solicitor or party causing a warrant to issue, prepares it and takes it ready stamped with a Chancery stamp of 3*s*. (unless the costs are payable out of a fund in court, when the warrants are not stamped, see page 376), and the taxing master's clerk will then fill up the date of the return and issue it. In the second part of the first schedule to the General Orders of 25th October, 1852, the issuing of more than one warrant or summons on one bill or set of bills is prohibited, unless the taxing master shall think it necessary to issue a new warrant or summons; and by the 1st of those Orders the solicitor or party leaving a bill for taxation is, upon receiving a written application, with an undertaking to pay the proper charges, to make copies for the parties requiring them, and have them ready for delivery at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the court may in any case direct, and they are to be de-

livered accordingly, upon demand and payment of the proper charges, viz. at the rate of 4*d.* per folio.

It is also required that copies of costs be made side for side, so as to correspond with the bills of costs left in the office. The folios are to be numbered consecutively in the margin, and the name and address of the party or solicitor by whom the copy is made is to be endorsed thereon, as upon the proceedings in the court; and such party or solicitor is to be answerable for the same being true copies of the original. All copies furnished are required by the 2nd of the same Orders to be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that usually adopted by law stationers, otherwise the parties or solicitors furnishing them shall not be entitled to be paid for them. The orders also provide for copies to be furnished at the office where the original is left, if the solicitor or party leaving it should refuse or neglect to supply them for two clear days; and by the 5th Order the taxing master is not to allow any costs in respect of any copy, not only of costs, but of any proceeding so taken, unless the same shall appear to him to have been requisite, and to have been made with due care, both as regards the contents and the writing thereof.

When the service of a warrant requires proof before the taxing master, the person who effected the service may be sworn before him upon payment of a fee of 1*s.* 6*d.*

On the completion of the taxation, each party casts his own bill or bills, for which purpose he is allowed to take them away, and he then leaves them so cast with the clerk of the taxing master for him to check; and when all the bills are so cast and returned, the certificate of taxation may issue.

The certificate is prepared by the taxing master's clerk in the absence of the parties, and signed by the master. It bears for itself a fee of 1*l.*, besides an ad valorem fee upon the amount of each bill as taxed as follows: for every bill,

as taxed, where the amount shall not exceed 20*l.*, ten shillings; and for every additional 20*l.*, or fractional part thereof, a further fee of ten shillings. The whole of these fees, including all the bills taxed under one decree or order, and the certificate fee of 1*l.*, may be included in one stamp to be impressed upon the certificate. This stamp is furnished sometimes by the solicitor or party taking the certificate, and sometimes by the stationer of the taxing office, by whom the certificate is engrossed.

There is, however, an exception to this practice of paying the fees of taxation in the mode just stated; for by the 7th of the Orders of 25th October, 1852, it is provided that in all cases where the costs are directed to be paid out of a fund in court, the fees of taxation shall not be payable by means of stamps, but shall be carried over by the accountant general to the credit of the Suitors' Fee Fund; and to that intent the taxing master shall in such cases certify the amount of such fees.

The certificate when signed by the master is to be filed in the report office, and an office copy being taken, may be acted on for all requisite purposes.

It sometimes, however, happens that, after a bill is taxed or partly taxed, by arrangement between the parties, the costs are satisfied and the taxation is not further proceeded with, in which case a certificate is not taken. This contingency having been left unprovided for by the former orders, the General Order of the 4th December, 1852, was issued partly to remedy the omission. It provides that when no certificate of the taxation of a bill of costs shall be required, the ad valorem duty directed by the Order of the 25th October to be levied by stamps on the master's certificate, shall nevertheless be due, and shall be payable on the amount of the bill as taxed, or on the amount of such part thereof as may have been taxed; and the solicitor is in such case to cause the proper stamp (the amount thereof to be fixed by the master) to be impressed on or annexed to the bill of costs.

Where there is no decree or order directing the taxation, but the taxation takes place upon the request of the master in ordinary or other officer, whether of this court or not, the only certificate that issues is endorsed on the bill itself, and is to the following effect: "I have taxed this bill at the sum of ——, A. B., —— June, 1854." The bill with this endorsement is then returned to the officer requesting the taxation.

Sometimes it happens that the taxing masters of this court require the assistance of a common law, or other officer, in the taxation of bills containing items for business done in other courts; and by a General Order of the 29th November, 1853, it is provided that when the taxing master sends a bill, or part of a bill of costs, to the officer of any other court, with a request to such officer to assist him in the taxation thereof, and the officer of such other court shall have taken his fee thereon, the ad valorem duty directed to be levied in respect of the taxation of costs by the Order of the 25th October, 1852, and 4th December, 1852, is not to be paid on that part of the bill so taxed and charged for by the officer of such other court.

When costs are directed to be taxed in case the parties differ about the same, the course of the parties is regulated by the 76th of the Orders of 1828, amended by the 76th Order of the 23rd November, 1831, which gives the party liable to pay the option of paying without a taxation, as implied by the direction to tax.

The Order is as follows: "That where a master is directed to settle a conveyance, or to tax costs in case the parties differ about the same, then the party claiming the costs or entitled to prepare the conveyance shall bring the bill of costs or the draft of the conveyance into the master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, and may take a copy thereof if he thinks fit; and at or

before the expiration of the eight days, or such further time as the master shall in his discretion allow, he shall then either agree to pay the costs or adopt the conveyance, as the case may be, or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs, or to deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he make no such tender, nor deliver any such statement in writing, or if the other party refuses to accept the sum so tendered, or to adopt the proposed alterations in the draft of the conveyance, the master shall then proceed to tax the costs, or settle the conveyance, according to the practice of the court. And in case the taxed costs shall not exceed the sum tendered, or the master shall adopt the proposed alterations in the draft of the conveyance, then the costs of the taxation, or the costs of the proceeding with respect to the conveyance, shall be borne by the other party."

By the 31st General Order of 26th October, 1842, so much and such parts of the last-mentioned order as relate to the taxation of costs shall be interpreted as if the same were further amended by substituting the words "taxing master" for the word "master."

The Lord Chancellor has, by an intimation of the 24th December, 1852, instructed the taxing masters as follows:— "Where, in pursuance of any direction by the court or judge, or of any request by a master in ordinary, drafts are settled by any of the conveyancing counsel under 15 & 16 Vict. c. 80, s. 41, the expense of procuring such drafts to be previously or subsequently settled by other counsel, is not to be allowed on taxation as between party and party, or as between solicitor and client, unless the court shall specially direct such allowance." This intimation, however, is not to prevent the allowance of the expense in cases which may already have occurred, where, in the judgment of the taxing master, there has been a reasonable ground for laying the papers before other counsel. The court directed counsel's fees

for settling a mortgage deed on behalf of a mortgagee advancing money ordered to be raised in a suit to be allowed in taxing the mortgagee's costs. (*Nicholson* v. *Jeyes*, 1 Eq. Rep. 34.)

If a solicitor agrees with another solicitor, who is a trustee, to sell property mortgaged to himself and co-trustees on agency terms, the bill of costs of such solicitor, if taxed, will be properly taxed on the principle of principal and agent; but the trustee cannot himself benefit by the agreement, which will enure to the trustees, and through them to the parties entitled to the equity of redemption. (*Re Taylor*, 23 L. T. 72.)

MODE OF OBJECTING TO TAXATION AND REVIEWING SAME.

Any party who may be dissatisfied with the allowance or disallowance by the taxing master, in any bill of costs taxed by him of the whole or any part of any item or items, may, at any time before the certificate is signed, deliver to the other party or parties interested therein, and carry in before the master an objection in writing to such allowance or disallowance, specifying therein, by a list in a short and concise form, the items or item, or parts or part thereof objected to, and may thereupon apply to the master for a warrant to review the taxation in respect of the same. (12th G. O., 1st June, 1854.)

Upon the application for such warrant, or upon the return thereof, the taxing master is to reconsider and review his taxation upon such objection, and he may, if he shall think fit, receive further evidence in respect thereof; and if so required by either party, he is to state, either in his certificate of taxation or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. (13th ibid.)

Any party who may be dissatisfied with the certificate of the taxing master as to any item or part of an item which

may have been objected to as aforesaid may apply to the court by motion or petition for an order to review the taxation as to the same, and the court may thereupon make such order as to the court shall seem just; but the certificate of the taxing master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. (14th ibid.)

Such motions and petitions are to be heard and determined upon the evidence which shall have been brought in before the taxing master, and no further evidence is to be received upon the hearing thereof, unless the court shall otherwise direct. (15th ibid.)

Where an order directing a taxation was to be void, unless the master made his report in a fortnight, or certified that further time was necessary, and the time elapsed without any certificate being made, but the parties afterwards attended before the master without objecting, the irregularity was held to have been waived, and the master was ordered to proceed with the taxation. (*Re Field*, 16 Beav. 593.)

Where, on the taxation of costs as between party and party, the necessity for three counsel on one side has been considered, and the costs of the third counsel disallowed, the court will not interfere with the discretion of the taxing master. (*The Midland Railway Company* v. *Brown*, 22 L. J. 1092; 17 Jur. 969.)

An order having been made by consent of all parties for taxation of costs and payment to solicitors of a sum to be found due to them on such taxation, and the solicitors doing nothing for a year to forward such taxation, it was held that the parties could not then move to have the sum paid to them on the ground that the order was improperly obtained. (*Branding* v. *Plummer*, 21 L. T. 178.) If the same solicitor is employed by several parties in a suit, he will be allowed on the taxation of his costs, against each client, a proportion only of such costs, although each client may be liable at

law for the whole upon the joint retainers. (*Re Colquhoun*, 22 L. T. 299.)

Where, between the date of a notice of motion and the hearing of the motion, fifty-three motion days intervened, and the solicitor was unable to swear that he attended in court upon such days, the taxing master allowed only ten attendances, and the Vice-Chancellor on petition confirmed the master's decision. (*Hollocombe* v. *Hollocombe*, 17 Jur. 362.)

The following forms of bills of costs under the new practice may be found useful to the practitioner. (See next page.)

FORMS OF BILLS OF COSTS.

PLAINTIFF'S COSTS OF SUIT BY BILL.

In Chancery.

Between A. B. .. .. Plaintiff,

and

C. D. and E. F. .. .. .. Defendants.

The Bill of Costs of the Plaintiff to be taxed pursuant to decree [*or* "order"] dated the —— day of ——, 1854.

Hilary Term.	£	s.	d.
Instructions for bill	1	14	0
Drawing same, folios 50 [*at* 1*s. per folio*]	2	10	0
Fee to Mr. —— to settle and sign, and clerk ..	3	5	6
[*The old rule as to length is not now applicable, and the fee should be proportioned to the trouble and skill.*]			
Attending him	0	6	8
Copy for printer [*at* 4*d. per folio*]	0	16	8
Correcting proof sheet [*at* 2*d. per folio*]	0	8	4
Paid printer's bill			
[*As paid, but deducting any copies paid for by defendants.*]			
Paid filing bill	1	0	0
Paid stamping two copies for service	0	10	0
Service of one copy on defendant C. D. in town ..	0	2	6
Writing agent at Leeds, with copy for service on defendant E. F.	0	3	6
Paid his charges			

Interrogatories.

Drawing interrogatories for examination of defendants, folios 35 [*at* 1*s. per folio*]	1	15	0
Fee to Mr. —— to settle and sign, and clerk ..	2	4	6
Attending him	0	6	8
Engrossing [*at* 6*d. per folio*]	0	17	6
One partial copy for defendant C. D., folios 20 [*at* 4*d. per folio*]	0	6	8
One full copy for defendant E. F.	0	10	0
Paid examining and marking same as office copies ..	0	10	0
Service thereof respectively	0	5	0

	£	s.	d.
[*Date*] Attending summons for further time to answer, when a fortnight was granted, costs to be costs in the cause	0	6	8
Term fee	0	15	0

EASTER TERM.

Paid for office copy answer of defendant C. D., folios 40	0	13	4
Close copy	0	13	4
Paid for office copy answer of defendant E. F., folios 60	1	0	0
Close copy	1	0	0
[*If an injunction cause, abbreviating answer may be charged here, but not otherwise.*]			

Amendments.

Instructions to amend bill	0	6	8
Drawing amendments, folios 10	0	10	0
Fee to counsel to settle and sign, and clerk	1	3	6
Attending him	0	6	8
Drawing and engrossing petition for leave to amend..	0	4	0
Attending to present	0	6	8
Paid thereon	0	7	0
Two copies and services	0	5	0
Paid fee on amending	0	10	0
Amending two copies of bill for service	1	6	8
[*When there is no reprint,* 13*s.* 4*d. is allowed for amending each copy for service, and also each brief.*]			

Interrogatories to amended Bill.

Drawing further interrogatories, folios 10	0	10	0
Engrossing	0	5	0
One copy for defendant E. F. to answer	0	3	4
Service thereof	0	2	6
Paid for office copy answer to amended bill, folios 15	0	5	0
Close copy	0	5	0
[*If an injunction cause, abbreviating answer may be charged here.*]			
Term fee	0	15	0

TRINITY TERM.

Exceptions for Insufficiency.

Drawing exceptions to answer of defendant E. F., folios 12	0	12	0
Fee to counsel to settle and sign, and clerk	1	3	6
Attending him	0	6	8
Fair copy to file [*at* 4*d. per folio*]	0	4	0
Notice of filing	0	2	6

	£	s.	d.
Paid for certificate of record and writ clerk	0	4	0
Attending to set down exceptions	0	6	8
Notice thereof	0	2	6
Copy answer for the judge [*at 4d. per folio*]			
The like of exceptions			
Attending counsel with brief	0	6	8
His fee and clerk	3	5	6
[*Date*] Attending court, exceptions argued and allowed	0	13	4
Close copy minutes, 3 sides	0	1	6
Attending settling	0	6	8
Paid for order	2	0	0
Attending passing	0	6	8
Paid for copy further answer of defendant E. F., folios 20	0	6	8
Close copy	0	6	8
[*If an injunction cause, abbreviating answer may now be charged.*]			
Term fee	0	15	0

MICHAELMAS TERM.

Revivor and Supplement.

Brief to counsel to move for order to revive and carry on the suit against the legal personal representative of defendant C. D., who had died	0	2	6
His fee and clerk	0	10	6
Attending him and court, and to draw up order ..	0	6	8
Paid for order	0	5	0
Copy for service, folios 5	0	1	8
Personal service thereof	0	10	0

Motion for Injunction and Receiver.

Drawing notice of motion for an injunction and receiver	0	2	0
Copy and service on defendant's solicitor	0	2	6
Instructions for affidavit in support	0	6	8
Drawing same, folios 40	2	0	0
Engrossing	0	13	4
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	13	4
Instructions for brief	1	1	0
[*This may be charged once during the progress of the cause, either on a motion for an injunction, or for a decree or decretal order, or on replication being filed. This charge is in lieu of abbreviating bill.*]			

	£	s.	d.
Two brief copies of answer for counsel [*3s. 4d. per sheet of 10 folios.*]			
The like of affidavit, 4 sheets each	1	6	8
The like of notice of motion	0	2	0
Paid for copy affidavit in opposition, folios 15 ..	0	5	0
Two brief copies for counsel, 2 sheets each	0	13	4
Amending two copies of bill for counsel, the bill having been amended without a reprint	1	6	8
[*If oral testimony is used, charge accordingly. See charges for evidence for the hearing.*]			
Fee to Mr. —— to move, and clerk			
Attending him	0	6	8
The like to Mr. —— and clerk..			
Attending him	0	6	8
[*Date*] Attending court, motion not made	0	13	4
[*Date*] Attending court, motion made and order granted	0	13	4
Close copy minutes, 5 sides	0	2	6
Attending settling	0	6	8
Paid for order	1	0	0
Attending passing	0	6	8
[*For appointment of receiver, see* post.]			
Preparing injunction, folios —— [*at 1s. 4d. per folio*]			
[*This includes the engrossment and docket.*]			
Paid parchment			
Paid sealing	1	0	0
Copy injunction for service [*at 4d. per folio.*] ..			
Service thereof	0	10	0

Motion to pay Money into Court.

Drawing notice of motion for the defendant C. D. to pay into court the balance admitted by his answer to be in his hands	0	2	0
[*The charges on this motion are similar to those on a motion for an injunction or receiver, except that no evidence is required beyond the defendant's admission, and, in some cases, an affidavit of having cast the schedules; and if the court is moved for another purpose, the subject of this motion should be included, so as to save the expense of an additional motion.*]			

Motion for Decree or Decretal Order.

Drawing and fair copy notice of motion for decree [*or* decretal order] [*or if long, charge 1s. per folio.*] ..	0	2	0
Instructions for affidavit of plaintiff in support ..	0	6	8
Drawing same, folios 20..	1	0	0
Engrossing	0	6	8

	£	s.	d.
Attending him to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid filing and for office copy	0	6	8
Instructions for affidavit of M. N. in support ..			
[*Similar charges to the above.*]			
Two services of notice of motion on defendants' solicitors	0	5	0
Paid for copy affidavit of defendant E. F. in opposition, folios 12	0	4	0
The like of O. P., his witness, folios 8	0	2	8
[*Charge affidavits in reply, if any.*]			
Attending to set down motion	0	6	8
Instructions for brief	1	1	0
[*See note, ante, as to this item.*]			
Amending two copies of bill for counsel, the bill having been amended without a reprint [13*s.* 4*d. each*] ..	1	6	8
Abbreviating answers for counsel, folios —— and —— together folios 90 [*at* 4*d. per folio*]	1	10	0
Two brief copies for counsel, 9 sheets each, without schedules			
Drawing observations to accompany brief, 2 sheets ..	0	13	4
Two fair copies for counsel	0	13	4
The like of affidavits, 6 sheets each	2	0	0
The like of notice of motion	0	2	0
[*If oral testimony is used, charge it according to items given for evidence on the hearing.*]			
Term fee	0	15	0

HILARY TERM.

[*Date*] Attending court, motion in paper but not called on	0	13	4
[*Date*] The like motion heard and decree made ..	0	13	4
Close copy minutes, 7 sides	0	3	6
Attending settling	0	13	4
Paid for decree			
Attending passing	0	13	4
Attending to enter	0	6	8
[*Or, instead of a motion for decree or decretal order, the course may be as follows :*]			

Replication.

Instructions for drawing and engrossing replication ..	0	6	8
Paid parchment	0	1	0
Notice of filing to two solicitors in the cause	0	5	0
Instructions for brief	1	1	0
[*See note, ante, as to this item, which is in lieu of abbreviating bill.*]			

Evidence for the Hearing.

	£	*s.*	*d.*
Drawing notice requiring evidence to be taken orally	0	2	0
Two copies and services	0	5	0
Attending examiner for appointment to proceed in examination of witnesses	0	6	8
Præcipe for subpœna ad test., and attending to get same sealed	0	6	8
Paid sealing and for subpœna	0	5	4
Copy and personal service of subpœna and notice of appointment on witness G. H.	0	10	0
Paid him therewith	1	1	0
The like on I. J.	0	10	0
Paid him therewith	0	10	0
Drawing brief to counsel to attend appointment and examine witnesses, 3 sheets	1	0	0
Fair copy	0	10	0
Attending him therewith	0	6	8
His fee and clerk	3	5	6
[*Date*] Attending appointment when two witnesses were examined	0	13	4
[*Charge 6s. 8d. for each witness, or according to time engaged.*]			
Preparing summons to enlarge the time for closing evidence, and attending to get it sealed	0	6	8
Paid for same	0	3	0
Copy to leave at chambers	0	2	0
Two copies for service	0	4	0
Service thereof	0	5	0
[*Date*] Attending same, order made extending time for ten days	0	6	8
Attending for order and to get same entered	0	6	8
Paid stamp	0	5	0
Two copies and services of order	0	5	0
The defendant requiring to cross-examine plaintiff's witness, attending examiner appointing time for his cross-examination	0	6	8
[*Date*] Attending witness arranging for his attendance	0	6	8
Notice to defendant's solicitor thereof	0	2	6
[*Date*] Attending when witness was cross-examined and re-examined	0	6	8
[*Date*] Attending examination of defendant's witnesses and cross-examining them, engaged three hours	1	0	0
[*If by counsel, charge his brief.*]			
Paid for office copy depositions of plaintiff's witnesses, folios			
The like of defendant's witnesses			

	£	s.	d.
Abbreviating same [*at 4d. per folio*]			
Two brief copies for counsel, —— sheets each [*at 10 folios per sheet*]			
Abbreviating answers, together folios —— (without schedules) [*at 4d. per folio, if not before charged.*] ..			
Two brief copies for counsel, —— sheets each ..			
Drawing observations to accompany brief, 2 sheets ..	0	13	4
Two fair copies for counsel	0	13	4
Amending two copies of bill for counsel, the bill having been amended without a reprint [*13s. 4d. each*] ..	1	6	8
Fee to Mr. —— with brief, and clerk	5	10	0
Attending him	0	6	8
His consultation fee and clerk	2	9	6
Attending him	0	6	8
Fee to Mr. —— with brief, and clerk	3	5	6
Attending him	0	6	8
His consultation fee and clerk	1	3	6
Attending him	0	6	8
Attending consultation	0	13	4
[*Date*] Attending court, cause in paper but not called on	0	10	0
[*Date*] Attending court, cause heard and decree made [*Refresher fees will be charged if the hearing goes over to another term.*]	0	13	4
Copy minutes, 8 sides	0	4	0
Attending settling	0	13	4
Paid for decree	4	0	0
Attending passing	0	13	4
Attending to enter	0	6	8
Term fee	0	15	0

EASTER TERM.

The decree directing accounts and inquiries to be taken and made in chambers, and leasehold property to be sold with the approbation of the judge, copy order to certify and leave at chambers, folios 12	0	4	0

First Summons.

Preparing summons to proceed in prosecution of order, and attending to get it sealed	0	6	8
Paid for same	0	3	0
Copy to leave at chambers	0	2	0
Two copies for service	0	4	0
Service thereof	0	5	0
[*Date*] Attending summons when evidence and accounts were directed to be brought in by plaintiff and defendant respectively; an abstract to be laid			

	£	s.	d.
before one of the conveyancing counsel for his opinion on the title to the property to be sold; conditions of sale to be prepared and brought in; an advertisement for creditors to issue; and the appointment of a receiver; and summons was adjourned for three weeks	0	6	8
[*This is the charge, unless it be increased by the chief clerk, who will allow* 13*s.* 4*d.*, *or* 1*l.* 1*s. when the attendance will justify it; and the judge may allow a further fee, not exceeding* 10*l.* 10*s.*, *under particular circumstances.*] (See Orders of 23rd Oct. 1852, and 2nd Feb. 1855.)			
Advertisement.			
Preparing advertisement	0	6	8
Attending to get same approved and signed	0	6	8
Paid stamp	1	0	0
Copy to leave at chambers	0	2	0
Four copies for insertion	0	4	0
Attending at Gazette office to insert same	0	6	8
Paid for insertion and Gazette			
Attending at Times and Chronicle offices	0	6	8
Paid for insertion in Times and paper			
The like in Chronicle and paper			
Attending agent of two country journals, bespeaking insertions	0	6	8
Paid insertion in Worcester Chronicle and paper ..			
The like in Oxford Journal and paper			
Claims.			
Paid for office copy affidavit of K. L., a claimant, folios 12	0	4	0
The like of M. N., folios 6	0	2	0
Perusing same and attending at chambers at the time appointed by advertisement	1	1	0
[*If the number of claims exceeds five, charge for every additional number, not exceeding five, an additional* 1*l.* 1*s.*]			
Sale of Property.			
Drawing two abstracts of title, 8 sheets and 7, together 15 sheets	5	0	0
Fair copy	2	10	0
Attending at Registrar's Office with a memorandum for conveyancing counsel in rotation to be marked, and afterwards at counsel's chambers therewith, and with abstract	0	6	8
Paid his fee, and clerk to advise on title	3	5	6

	£	s.	d.
Attending him	0	6	8
Drawing and fair copy, particulars and conditions of sale, folios 20	1	0	0
Paid fee to counsel to settle same, and clerk ..	1	3	6
Attending him	0	6	8
Attending auctioneer, instructing him to view the property, to determine on what day it had better be put up for sale, and as to reserved bidding	0	6	8
Paid him	2	2	0
Instructions for affidavit of auctioneer for the satisfaction of the judge	0	6	8
Drawing same, folios 10	0	10	0
Engrossing	0	3	4
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	3	4
Notice to two solicitors of filing, and intention to read same	0	5	0
Paid for copy affidavit verifying accounts, folios 10 ..	0	3	4
The like of accounts therein referred to, folios 50 ..	0	16	8
Close copy affidavit and accounts	1	0	0
[*Date*] Attending adjourned summons, when the accounts were vouched and several claims allowed, and the particulars and conditions of sale settled and directed to be printed, and summons was further adjourned for three weeks	1	1	0
[*There will be charges for preparing the advertisement of sale, and getting it signed and inserted, similar to those for an advertisement for creditors, ante, but varying as to the number of insertions.*]			
Attending Mr. W., auctioneer, conferring as to sale of property, and arranging terms with him, subject to the judge's approval	0	6	8
Instructions for affidavit of fitness of auctioneer ..	0	6	8
Drawing same, folios 4	0	4	0
Engrossing	0	1	4
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	3	4
Notice to two solicitors of intention to read two affidavits	0	5	0
[*Date*] Attending adjourned summons, when Mr. W. was approved, and his remuneration fixed	0	6	8
Copy particulars and conditions for printer, folios 20	0	6	8
Attending, instructing him	0	6	8
Examining proof sheet [*at 2d. per folio*]			

	£	s.	d.
Paid his bill			
Attending chief clerk for reserved biddings, and delivering same to auctioneer	0	6	8
[*Date*] Attending at the auction mart, when the property was sold in two lots	1	1	0
Instructions for affidavit of auctioneer of result of sale	0	6	8
Drawing same, folios 5	0	5	0
Engrossing	0	1	8
Attending him to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid filing and office copy	0	1	8
[*Date*] Attending adjourned summons, and produced affidavit of auctioneer, and certificate of approval of purchasers was prepared, copied and signed ..	0	13	4

Payment of Purchase Money.

[*Date*] Attending summons for Mr. ——, purchaser of lot 1, to pay his purchase money into court, and asking for investment	0	6	8
The like of Mr. ——, purchaser of lot 2	0	6	8

Investment.

Drawing request for accountant-general to invest same	0	2	6
Attending bespeaking investment	0	6	8
The purchaser of lot 1 having delivered draft conveyance for perusal, perusing same, 3 skins	0	15	0
Writing his solicitor therewith approved	0	3	6
Having received engrossment, examining same ..	0	10	0
Attending plaintiff, procuring his execution thereof, and attesting same	0	6	8
Writing purchaser's solicitor therewith executed ..	0	3	6
The purchaser of lot 2 having delivered draft conveyance for perusal, perusing same, when it appeared that there were unnecessary parties thereto, and it would be necessary for the judge to settle it in chambers, 2 skins			
[*Date*] Attending summons to settle draft conveyance as to lot 2, when the judge decided that the plaintiff alone could make a good title and settled the draft by striking out the other parties	0	13	4
[*If the judge should require a conveyancing counsel to assist him, the course pointed out, ante, on taking an opinion on the abstract of title will be followed.*]			
Having received engrossment, examining same with draft, 2 skins	0	10	0

	£	s.	d.
Attending the plaintiff, procuring his execution, and attesting same	0	6	8
Writing purchaser's solicitor therewith executed ..	0	3	6

Guardian and Maintenance.

The decree also directing the appointment of a guardian for infant defendant, O. P., and the allowance of maintenance, preparing summons for that purpose, and attending to get same sealed	0	6	8
Paid stamp	0	3	0
Copy to leave at chambers	0	2	0
Two copies for service	0	4	0
Service thereof	0	5	0
Instructions for affidavit of nature and amount of infant's fortune, his age and relatives, &c.	0	6	8
Drawing same, folios 20	1	0	0
Engrossing	0	6	8
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	6	8
[*Charge also affidavits of fitness of person proposed as guardian, and his or her affidavit of willingness to act, and of no interest adverse to that of the infant.*]			
[*Date*] Attending summons, when the proposed guardian was appointed, and past, and future maintenance fixed	0	6	8
[*When there are other relatives not before the judge, they may be required to be served before any order will be made.*]			
Close copy, minutes of order drawn by registrar, 2 sides	0	1	0
Attending settling	0	6	8
Paid for order	1	0	0
Attending passing	0	6	8

Certificate or Report.

Copy draft certificate as prepared by the chief clerk, folios 20	0	6	8
[*Date*] Attending adjourned summons, when draft certificate was partially settled, and a further adjournment till to-morrow took place	0	6	8
Or whatever larger sum, not exceeding 1*l.* 1*s., the chief clerk may allow, the judge having power to allow a further sum not exceeding* 10*l.* 10*s.*]			
Copy alterations made in draft, folios 4	0	1	4
Attending adjourned summons this day, when the certificate was settled	0	6	8

	£	s.	d.
Engrossing certificate, folios 24	0	8	0
Stamp	1	0	0
[*Date*] Attending adjourned summons, when certificate was signed by the chief clerk	0	6	8
Attending to bespeak and procure office copy certificate	0	6	8

Setting down Cause for further consideration.

Drawing request to set down cause for further consideration	0	4	0
Attending to set down same	0	6	8
Notice to two solicitors for defendants of cause being set down	0	5	0

[*Insert charges for affidavit of service.*]

Briefs.

Drawing brief on further consideration, 3 sheets ..	1	0	0
Two fair copies for counsel	1	0	0
Drawing observations to accompany, 2 sheets ..	0	13	4
Two fair copies	0	13	4
Paid fee to Mr. —— with brief and clerk	3	5	6
Attending him	0	6	8
Paid fee to Mr. —— with brief and clerk	2	4	6
Attending him	0	6	8
[*Date*] Attending court, cause in paper but not called on	0	10	0
[*Date*] Attending court, cause heard and order made, the money in court being directed to be paid out to the parties entitled	0	13	4
[*Refresher fees will be charged if the hearing goes over to another term.*]			
Close copy minutes, 3 sides	0	1	6
Attending settling	0	13	4
Paid for order	4	0	0
Attending passing	0	13	4
Attending to enter	0	6	8
Term fee	0	15	0

TRINITY TERM.

Taxation of Costs.

Copy order for the taxing master, folios 10	0	3	4
Attending for reference [*allowed only as between solicitor and client*]	0	6	8
Drawing bill of costs and copy, folios 50 [*at 8d. per folio*]	1	13	4

	£	s.	d.
Warrant on leaving 2 copies and services	0	5	0
[*The costs being payable out of a fund in court, no warrants or fees of taxation are paid by the solicitor, they being carried over by the accountant general to the Suitors' Fee Fund under a General Order of the court. In other cases they will be charged.*]			
Paid for copy, costs of defendant C. D. folios 20 ..	0	6	8
Warrant for defendant E. F. to bring in his costs, copy and service	0	2	6
Paid for copy thereof, folios 20	0	6	8
Attending taxing plaintiff's costs	0	13	4
The like of defendant C. D.	0	6	8
The like of defendant E. F.	0	6	8
Engrossing certificate	0	2	0
Attending to file	0	6	8
Paid for office copy			
Attending registrar for direction for sale of sufficient of the fund in court to pay costs	0	6	8

Accountant-General.

Attending accountant-general, bespeaking sale ..	0	6	8
Instructions for affidavit of residue and thirds ..	0	6	8
Drawing same, folios 3	0	3	0
Engrossing	0	1	0
Attending to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	1	0
Attending accountant general, bespeaking carrying over of two-thirds to separate accounts	0	6	8
Attending plaintiff, identifying him on his receiving the other third	0	6	8
Term fee	0	15	0

DEFENDANT'S COSTS OF SUIT BY BILL.

In Chancery.

Between A. B. .....Plaintiff.
C. D. .....Defendant.

The Bill of Costs of the Defendant to be taxed pursuant to decree dated the —— day of —— 1854.

HILARY TERM.

Appearance.

	£	s.	d.
[*Date*] Instructions for appearance	0	6	8
[*6s. 8d. for one or more defendants, not exceeding*			

	£	s.	d.
three, and if exceeding three, then for every additional number not exceeding three, an additional 6s. 8d. (Morritt v. Walton, 18 Jur. 563; 23 L. T. 239.)]			
Paid entering same	0	7	0
[*If more than three defendants, then for every number not exceeding three 7s.*]			
Notice thereof	0	2	6
Perusing and considering bill	1	1	0
[*This fee is allowed on behalf of each defendant or set of defendants appearing by the same solicitor.*]			

Time to Answer.

Preparing summons for time to answer and attending to get it sealed	0	6	8
Paid for same	0	3	0
Copy to leave at chambers	0	2	0
Copy to serve	0	2	0
Service thereof	0	2	6
Attending same, when a fortnight was granted, the costs to be costs in the cause	0	6	8
[*If an affidavit is used in support of the summons, charge it, but it is seldom required on a first application.*]			

Answer.

Instructions for answer	0	13	4
Drawing same, and fair copy, folios 40	2	0	0
Fee to Mr. —— to settle and sign, and clerk	2	4	6
Attending him	0	6	8
Engrossing at 6*d.* per folio	1	0	0
Paid parchment	0	5	0
Attending defendant, reading over engrossment ..	0	13	4
[*When it does not exceed 20 folios 6s. 8d., and for every additional 50 folios 6s. 8d.*]			
Attending him to be sworn	0	6	8
Paid oath	0	1	6
Notice of filing	0	2	6
[*If an injunction cause, the following item may be charged as soon as the answer is filed.*]			
Abbreviating answer, folios [*at 4d. per folio*] ..			

Guardian ad litem.

[*If the defendant is an infant or under disability the following charges may be applicable.*]			
Drawing and engrossing petition for appointment of guardian	0	4	0

	£	s.	d.
Instructions for affidavit of fitness of proposed guardian, and of no adverse interest	0	6	8
[*Charge drawing, engrossing, &c. affidavit in the usual way.*]			
Attending to present petition	0	6	8
Paid for order	0	7	0
Copy and service	0	2	6

Exceptions for Insufficiency.

Paid for copy exceptions, folios 10	0	3	4
Brief copy, answer for counsel, 4 sheets	0	13	4
The like of exceptions	0	3	4
Fee to Mr. —— therewith and clerk	3	5	6
Attending him	0	6	8
[*Date*] Attending court, exceptions argued and allowed	0	13	4
Close copy, minutes of order, 2 sides	0	1	0
Attending settling	0	6	8
Attending passing order	0	6	8

Further Answer.

Instructions for further answer..	0	13	4
Drawing same, folios 15	0	15	0
[*Other charges, as in the case of a first answer.*]			
[*When the bill is amended and there is no reprint, charge amending each brief* 13*s.* 4*d.*]			

Motion for Injunction and Receiver.

Having been served with notice of motion for an injunction and receiver, instructions for brief to counsel to oppose	1	1	0
[*This fee is allowed once in a cause, either on replication being filed, or on a motion for a decree on a bill, or in an injunction cause on moving for the injunction.*]			
Instructions for affidavit in opposition	0	6	8
Drawing same, folios 20	1	0	0
Engrossing	0	6	8
Attending deponent to be sworn	0	6	8
[*If sworn in the country charge accordingly.*]			
Paid filing and oath	0	4	0
Paid for office copy	0	6	8
Paid for copy affidavit in support of motion, folios 24	0	8	0
Drawing observations, 2 sheets..	0	13	4
Two fair copies for counsel	0	13	4
The like of notice	0	2	0
[*If not charged before.*]			

	£	s.	d.
Abbreviating answer, folios —— [*at 4d. per folio*].			
Two fair copies for counsel [*3s. 4d. per sheet of 10 folios*]			
Brief copies of affidavits for counsel, 3 sheets each ..	1	0	0
[*If any oral testimony, charge according to charges for evidence for the hearing. See plaintiff's costs.*]			
Fee to Mr. ——, with brief and clerk	4	6	6
Attending him	0	6	8
Fee to Mr. ——, with brief and clerk	3	5	6
Attending him	0	6	8
[*Date*] Attending court, motion not made	0	13	4
[*Date*] Attending court, motion made and order granted	0	13	4
Close copy minutes, 5 sides	0	2	6
Attending settling	0	6	8
Attending passing order	0	6	8
Term fee	0	15	0

Easter Term.

Motion for Decree or Decretal Order.

Having been served with notice of motion for a decree [or decretal order], paid for copies of affidavits filed in support, viz. :—			
Affidavit of A. B., folios 12	0	4	0
Affidavit of C. D., folios 20	0	6	8
Instructions for brief	1	1	0
[*This fee is chargeable once only in a cause, either on replication being filed, or a motion for decree on a bill, or in an injunction cause on moving for the injunction.*]			
Instructions for affidavit of defendant in opposition ..	0	6	8
Drawing same, folios 30	1	10	0
Engrossing	0	10	0
Attending him to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	10	0
Notice of filing to plaintiff's solicitor	0	2	6
Paid for copy affidavit in reply, folios 8	0	2	8
Two brief copies of affidavits for counsel, 7 sheets each	2	6	8
[*If any oral testimony, charge it according to the charges for evidence on the hearing.*]			
Abbreviating answer (if any filed, and if not before charged), folios —— [*at 4d. per folio*]			
Two brief copies for counsel, 4 sheets each, without schedules	1	6	8
Drawing observations to accompany brief, 2 sheets ..	0	13	4

	£	s.	d.
Two fair copies for counsel	0	13	4
[*Charge delivering briefs to counsel, as shown in the case of a motion for an injunction, adding, if necessary, consultation fees and attendances.*]			
[*Date*] Attending court, not on	0	10	0
[*Date*] Attending court, cause heard	0	13	4
Close copy, minutes of decree, 10 sides	0	5	0
Attending settling	0	13	4
Attending passing	0	13	4
[*If, instead of a motion for decree, replication is filed, then as follows :—*]			

Replication filed.

Replication being filed, instructions for brief ..	1	1	0
[*This fee is allowed after replication and in the other cases mentioned, ante, but only once in a cause.*]			
[*The evidence on behalf of the defendant is similar to that for the plaintiff, and need not be here repeated.*]			
[*Date*] Attending summons served by the plaintiff to enlarge the time for closing evidence, when it was enlarged for fourteen days, the costs to be costs in the cause	0	6	8
Term fee	0	15	0

Trinity Term.

Briefs for hearing.

Paid for copy depositions of plaintiff, folios 50 ..	0	16	8
The like of defendant, folios 45	0	15	0
Abbreviating same [*at 4d. per folio*]	1	11	8
Abbreviating answer, folios 40 [*at 4d. per folio, including schedules*]	0	13	4
[*If not before charged.*]			
Paid for copy affidavit of L. M., intended to be read by plaintiff on the hearing, folios 9	0	3	0
Two brief copies of depositions for counsel, 10 sheets each	3	6	8
The like of answer, 4 sheets each, without schedules	1	6	8
[*If any brief copy has been previously charged for the purposes of a motion for an injunction, or otherwise, it must not be repeated here.*]			
The like of affidavit of L. M., 1 sheet each	0	6	8
Drawing observations to accompany briefs, 2 sheets ..	0	13	4
Two fair copies for counsel	0	13	4
Paid Mr. ——, with brief and clerk	5	10	0
Attending him	0	6	8

	£	s.	d.
Paid his consultation fee and clerk	2	9	6
Attending to appoint consultation	0	6	8
Paid Mr. ——, with brief and clerk	3	5	6
Attending him	0	6	8
Paid his consultation fee and clerk	1	3	6
Attending to appoint consultation	0	6	8
Attending consultation	0	13	4
[*Date*] Attending court, cause in paper but not called on	0	10	0
[*Date*] Attending court, cause heard and decree made	0	13	4
Close copy minutes, 10 sides	0	5	0
Attending settling	0	13	4
Attending passing decree	0	13	4
Term fee	0	15	0

[*Refresher fees will be charged if the hearing goes over to another term.*]

MICHAELMAS TERM.

[*Date*] Attending summons to proceed in prosecution of decree, when defendant was directed to bring in account, and other directions were given	0	13	4
Drawing and fair copy account to leave in chambers [*at 8d. per folio.*]			
Instructions for affidavit verifying same	0	6	8
Drawing, folios 14	0	14	0
Engrossing	0	4	8
Attending defendant to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	4	8
Notice to plaintiff's solicitor of affidavit filed ..	0	2	6
Term fee	0	15	0

[*Charge also any other necessary evidence.*]

N.B.—*The defendant's other costs of proceedings in chambers, and of the hearing for further consideration, may for the most part be readily made out from those of the plaintiff.*

PLAINTIFF'S COSTS OF SUIT BY CLAIM.

In Chancery.

Between A. B. .. .. Plaintiff,

and

C. D. .. .. Defendant.

The Bill of Costs of the Plaintiff to be taxed pursuant to order dated the —— day of ——, 1854.

HILARY TERM.	£	s.	d.
[*Date*] Instructions to sue	0	6	8

	£	s.	d.
Instructions for claim	0	13	4
Preparing and filing	2	2	0
Fee to counsel to settle and sign, and clerk	1	3	6
Attending him	0	6	8
Copy for printer, folios 20 [*at 4d. per folio*]	0	6	8
Correcting proof sheet [*at 2d. per folio*]	0	3	4
Paid printer's bill [deducting any copies paid for by defendant] as paid.			
Paid stamps for claim, and three copies to serve, *5s.* each	1	0	0
[*If the claim be special.*			
Brief to counsel to move for leave to file	0	10	0
Paid his fee and clerk	1	3	6
Attending him	0	6	8
Attending court, leave given	0	13	4]
Service of copy claim on defendant A. B.	0	2	6
The like on defendants C. D. and E. F.	0	5	0
[*If the claim is amended without a reprint, then, besides costs of order and amending, charge 13s. 4d. for each copy to serve.*]			

Evidence.

Instructions for affidavit of plaintiff in support of claim	0	6	8
Drawing same, folios 15	0	15	0
Engrossing	0	5	0
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	5	0
Attending examiner for appointment to proceed on examination of witnesses	0	6	8
Præcipe for subpœna ad test., and attending to get same sealed	0	6	8
Paid sealing and for subpœna	0	5	4
Copy and personal service of subpœna, and notice of appointment on witness G. H.	0	10	0
Paid him therewith	1	1	0
The like on J. T.	0	10	0
Paid him therewith	0	10	0
Drawing brief to counsel to attend appointment and examine witnesses, 3 sheets	1	0	0
Fair copy	0	10	0
Attending him therewith	0	6	8
His fee and clerk	3	5	6
Attending appointment, when two witnesses were examined	0	13	4
[*Charge 6s. 8d. for each witness, or according to time engaged.*]			

	£	s.	d.
Defendant having filed an affidavit to be used on the hearing, notice to defendant's solicitor of intention to cross-examine	0	2	6
[*Or, if necessary, charge subpœna ad test. and service.*]			
Attending for appointment	0	6	8
[*Date*] Attending cross-examining defendant's witness	0	13	4
[*This charge should be regulated by the time occupied.*]			
Paid for copy of depositions, folios 20	0	6	8
The like on cross-examination, folios 10	0	3	4
Abbreviating same [*at 4d. per folio*].			
Paid for copy affidavit in opposition to claim, folios 10	0	3	4
Paid for certificate to set down claim	0	4	0
Attending setting it down	0	6	8
[*If heard as short.*			
Drawing and fair copy certificate for signature of counsel, and attending him therewith	0	6	8]
Two brief copies of affidavits, and depositions for counsel, folios 15, 20, 10, and 10, together 55 folios —6 sheets each	2	0	0
Brief and instructions to counsel on hearing	1	0	0
[*This sum is allowed by the order of the court, but may be increased under the circumstances of any particular case.*]			
Two copies of will to accompany brief, two sheets each	0	13	4
[*Charge any other copies of documents necessary to be furnished to counsel; and if the claim has been amended without a reprint, charge* 13*s.* 4*d. for amending each brief.*]			
Fee to Mr. ——, with brief and clerk	3	5	6
Attending him	0	6	8
Fee to Mr. ——, with brief and clerk	2	4	6
Attending him	0	6	8
[*It is not always justifiable to deliver two briefs, but in contested cases, or cases involving any difficulty, it will be allowed.*]			
[*If necessary, but not otherwise, a consultation may be had, in which case charge as follows:*			
Consultation fee to Mr. —— and clerk	2	9	6
Attending him	0	6	8
The like to Mr. —— and clerk	1	3	6
Attending him	0	6	8
Attending consultation	0	13	4]
[*Date*] Attending court, claim in paper but not called on	0	10	0

	£	s.	d.
[*Date*] The like this day	0	10	0
[*Date*] Attending court, claim heard, and order made	0	13	4
Copy minutes, four sides	0	2	0
Attending settling	0	13	4
Paid for order	2	0	0
Attending passing	0	13	4
Attending to enter	0	6	8
Term fee	0	15	0

[*For costs of proceedings in chambers, see "Plaintiff's Costs of Suit by Bill."*]

DEFENDANT'S COSTS OF SUIT BY CLAIM.

In Chancery.

Between A. B. .....Plaintiff,

and

C. D. .....Defendant.

The Bill of Costs of the Defendant to be taxed pursuant to order dated the —— day of ——, 1854.

HILARY TERM.	£	s.	d.
[*Date*] Instructions to defend	0	6	8
Instructions to appear and entering appearance ..	0	13	4
[*If more than three defendants, charge 6s. 8d. in addition to the 13s. 4d. for every number, not exceeding three, beyond the first three.*]			
Paid entering appearance	0	7	0
[*If more than three defendants, then for every number not exceeding three, 7s.*]			
Notice thereof to plaintiff's solicitor	0	2	6
Instructions for affidavit of K. L. in opposition to claim	0	6	8
Drawing same, folios 10	0	10	0
Engrossing	0	3	4
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	3	4
The plaintiff requiring to cross-examine the deponent, and having obtained an appointment for that purpose, attending, informing him thereof, and requiring his attendance	0	6	8
[*Date*] Attending at Examiner's Office with deponent on his cross-examination	0	6	8
Paid for copy depositions on cross-examination, folios 6	0	2	0

	£	s.	d.
The like of depositions of plaintiff's witnesses before examiner, folios 20	0	6	8
Abbreviating same [*at 4d. per folio*]	0	8	8
Paid for copy affidavit of G. H. in support of claim, folios 15	0	5	0
Two brief copies of affidavits and depositions for counsel, folios 15, 10 and 26—6 sheets each ..	2	0	0
Brief and instructions to counsel on hearing	1	0	0
[*This sum is allowed by the order of the court, but it may be increased under the circumstances of any particular case.*]			
Two copies of will to accompany brief, 2 sheets each ..	0	13	4
[*Charge any other copies of documents necessary to accompany the brief; and if the claim has been amended without a reprint, charge 13s. 4d. for amending each brief.*]			
Fee to Mr. ——, with brief and clerk	3	5	6
Attending him	0	6	8
Fee to Mr. ——, with brief and clerk	2	4	6
Attending him	0	6	8
[*If necessary, but not otherwise, a consultation may be had, in which case charge as follows:*			
Consultation fee to Mr. —— and clerk	2	9	6
The like to —— and clerk	1	3	6
Attending severally on counsel, appointing consultation	0	13	4
Attending consultation	0	13	4]
[*Date*] Attending court, claim in paper, but not called on	0	10	0
[*Date*] The like this day	0	10	0
[*Date*] Attending court, claim heard, and order made	0	13	4
[*If the cause is not fully heard during the same Term, refresher fees are not payable to counsel, a claim coming on by way of motion.*]			
Copy minutes, four sides	0	2	0
Attending settling	0	13	4
Attending passing order	0	13	4
Term fee	0	15	0
[N.B.—*The defendant's costs of proceedings in chambers, and of the hearing for further consideration, may, for the most part, be readily made out from those of the plaintiff.*]			

PLAINTIFF'S COSTS OF SUIT BY SUMMONS.

In Chancery.

In the matter of the estate of K. L., late of ——, in the county of ——, deceased.

A. B.
against
C. D.

The Bill of Costs of the Plaintiff to be taxed pursuant to order dated the —— day of ——, 1854.

HILARY TERM.	£	s.	d.
[*Date*] Instructions to commence proceedings in chambers to obtain an order to administer the estate of K. L., deceased	0	13	4
Preparing original summons and duplicate	0	13	4
Paid stamps	0	10	0
Attending at chambers to get same examined and sealed	0	6	8
Copy to leave at chambers	0	2	0
Copy to serve	0	2	0
Paid stamp	0	5	0
Attending at record and writ office to file duplicate and examine copy, and get same stamped	0	6	8
[*The charge is the same where there are several copies.*]			
Service of copy on defendant	0	2	6
Instructions for affidavit in support of summons ..	0	6	8
Drawing same, folios 8	0	8	0
Engrossing	0	2	8
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	2	8
Notice of filing and intention to read same	0	2	6
[*Date*] Attending summons when, there not having been seven clear days service, a new time was appointed..	0	6	8
Endorsing summons and copy, and attending to get same sealed	0	6	8
Copy for service	0	2	0
Service thereof	0	2	6
[*Date*] Attending adjourned summons, order made ..	0	6	8
[*This charge may be increased by the judge or chief clerk.*]			
(*When a new appointment or adjournment is granted by reason of an imperfect service, for which the plaintiff is blameable, he will not be allowed the extra costs occasioned thereby.*)			
Close copy minutes of order, 3 sides	0	1	6

	£	s.	d.
Attending settling	0	13	4
Paid for order	1	0	0
Attending passing	0	13	4
Attending to enter	0	6	8
Drawing and fair copy notice of order to be served on party interested in the estate	0	5	0
[*This charge will vary according to the length of the notice.*]			
Writing agent at Bristol therewith for service	0	3	6
Paid his charges and for affidavit of service			
Paid filing affidavit	0	2	6
Paid for office copy	0	15	0
Attending to enter memorandum of service	0	6	8
Term fee	0	15	0

N.B.—*The further costs are the same as in other cases.*

DEFENDANT'S COSTS OF SUIT BY SUMMONS.

HILARY TERM.	£	s.	d.
[*Date*] Having been served with summons for an order to administer estate of K. L., instructions to defend	0	13	4
Instructions for appearance	0	6	8
Entering same	0	7	0
Instructions for affidavit in opposition	0	6	8
[*If not the plaintiff's or his solicitor's.*]			
Drawing same, folios 8	0	8	0
Engrossing	0	2	8
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	2	8
Notice to plaintiff's solicitor of filing and intention to read same	0	2	6
[*Date*] Attending summons, when an order was made for an administration of the estate	0	13	4
Term fee	0	15	0

N.B.—*The further costs are the same as in other cases.*

RECEIVER'S COSTS.

(OF APPOINTMENT AND PASSING HIS FIRST ACCOUNT.)

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

The Bill of Costs of E. F., the Receiver of —— [*as the case may be*] in this cause, on being appointed and on passing his first account.

	£	s.	d.
Instructions for recognizance	0	6	8
Drawing same, folios —— [*at 1s. per folio*]			
Attending to settle	0	6	8
Engrossing [*at 6d. per folio*]			
Paid parchment			
Paid stamp			
Instructions for affidavit of sureties	0	6	8
Drawing same, folios —— [*at 1s. per folio*]			
Engrossing [*at 4d. per folio*]			
Attending deponents to be sworn	0	6	8
Paid two oaths and filing	0	5	6
Paid for office copy			
Attending receiver and sureties on their entering into recognizance	0	6	8
Paid taking same			
[*This item may be multiplied according to circumstances if the parties live at a distance from each other and cannot attend at the same time.*]			
[*If in the country the charges may be :*			
Writing agent with recognizance and affidavit ..	0	3	6
Paid his charges for getting same taken and sworn]			
[*Or as follows :*			
Attending to get recognizance taken and affidavit sworn (*Or several attendances on the parties when necessary.*)	0	6	8
Paid oath and taking recognizance]			
[*In this case the oath and taking will not be charged as firstly shown above.*]			
Attending to enrol recognizance	0	6	8
Paid			
Attending to draw up order appointing receiver ..	0	6	8
Paid	1	0	0
[*Or, if the receiver is named by the order of the court, subject only to his giving security, then :*			

	£	s.	d.
Copy draft certificate of security given, and fixing times for passing accounts and payment of balances [*at 4d. per folio*]			
Attending settling	0	6	8
Engrossing [*at 4d. per folio*]			
Paid stamp			
Attending to bespeak and procure office copy thereof	0	6	8
Paid for same]			
Letters and messengers	0	5	0
[*The following seven items are to be charged in the costs of the first account and omitted from subsequent accounts.*			
Copy order to leave in chambers, folios —— ..			
Preparing summons to proceed thereon and attending to get it sealed	0	6	8
Paid	0	3	0
Copy to leave	0	2	0
2 copies to serve	0	4	0
Service thereof	0	5	0
Attending summons when account was directed to be left	0	6	8]
Drawing and fair copy receiver's first account, folios— [*at 8d.*]			
Preparing summons to proceed thereon and attending to get it sealed	0	6	8
Paid	0	3	0
Copy to leave	0	2	0
2 copies to serve	0	4	0
Service thereof	0	5	0
Attending summons, when account was vouched and passed	0	13	4
[*This allowance is regulated by the chief clerk according to circumstances.*]			
Paid for two books			
Entering account therein [*at 4d. per folio*]			
Instructions for affidavit verifying account	0	6	8
Drawing same, folios ——			
Engrossing			
Attending receiver to be sworn	0	6	8
Paid oath and filing	0	4	0
[*If sent into the country, charge accordingly.*]			
Paid for office copy			
Drawing bill of costs and copy, folios —— [*at 8d. per folio*]			
Attending taxing	0	6	8
Copy draft certificate of account passed [*at 4d. per folio*]			

	£	s.	d.
Attending settling	0	6	8
Engrossing			
Attending to get stamp affixed	0	6	8
Paid			
Attending to get certificate signed	0	6	8
Attending to bespeak and procure office copy thereof	0	6	8
Paid for same			
Attending at accountant-general's for direction to pay in balance, and at the Bank to pay in same	0	13	4
Paid for office copy, accountant-general's certificate of payment			
Letters, &c.	0	5	0

N.B.—*The costs of vacating a recognizance, charged in a receiver's last account, will now probably be those of a summons at chambers for that purpose, instead of a petition as formerly.*

PLAINTIFF'S COSTS.

(ON APPOINTMENT OF RECEIVER, AND PASSING HIS FIRST ACCOUNT.)

[*Insert any charges incurred for necessary attendances, &c., to obtain instructions to propose, and ascertain fitness of, the party proposed as receiver.*]

	£	s.	d.
Preparing summons for the appointment of E. F. as receiver of the rents and profits of the real estate, and attending to get same sealed	0	6	8
Paid stamp	0	3	0
Copy to leave	0	2	0
Two copies to serve	0	4	0
Service thereof	0	5	0
Instructions for affidavit of value and nature of the property	0	6	8
Drawing same, folios 12	0	12	0
Engrossing	0	4	0
Attending deponent to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid office copy	0	4	0
Instructions for affidavit of fitness of proposed receiver	0	6	8
Drawing same, folios 4	0	4	0
Engrossing	0	1	4
Attending him to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy			

[*It may be necessary to have two such affidavits of fitness, particularly if the proposal be contested,*

	£	s.	d.
and there should also be an affidavit by the person proposed stating his willingness to act as receiver.]			
Instructions for affidavit of willingness of proposed receiver to act	0	6	8
Drawing same, folios 4	0	4	0
Engrossing	0	1	4
Attending him to be sworn	0	6	8
Paid oath and filing	0	4	0
Paid for office copy	0	1	4
Two notices to defendant's solicitors of filing affidavits and of intention to read same	0	5	0
Attending summons, when E. F. was to be appointed on his giving security	0	6	8
Paid for copy draft recognizance, folios ——			
Close copy			
Attending to settle same	0	6	8
Paid for copy affidavit of sureties, folios ——			
[*If receiver is, by the order of the court, directed to be appointed, subject only to his giving security, then—*			
Copy draft certificate of security given, and fixing times for passing accounts and payment of balances [*at 4d. per folio*]			
Attending settling	0	6	8]
Letters and messengers	0	5	0
[*The following item is to be charged in the costs of the first account, and omitted from the subsequent accounts:*			
Attending summons when account was directed to be left	0	6	8]
Paid for copy receiver's first account, folios —— ..			
Perusing same	0	6	8
[*Or according to length.*]			
Close copy [*at 4d. per folio*]			
Attending summons to proceed thereon	0	13	4
[*Or such larger fee as the chief clerk may allow.*]			
Paid for copy receiver's costs			
Attending taxing	0	6	8
Paid for copy defendant's costs			
Attending taxing	0	6	8
Paid for copy draft certificate of account passed ..			
Close copy [*at 4d. per folio*]			
Attending settling same	0	6	8
Drawing bill of costs and copy, folios —— [*at 8d. per folio*]			
Attending taxing	0	6	8
Letters and messengers	0	5	0

N.B.—*The costs of a defendant are similar to those of a plaintiff, except that a defendant takes copies of the costs of the receiver and the plaintiff.*

Payment and Transfer into Court.—Money, securities for money and effects belonging to suitors of this court are frequently placed in the custody of the accountant-general of this court by being paid, transferred or delivered at the Bank of England in his name and with his privity, there to remain subject to any order this court may make disposing of the same. The order to pay or transfer into court may be founded on admissions of the defendant, or upon some authentic document showing the necessary fact. After decree, it will not be made, as before decree, on admissions in the answer, but must rest on an examination or report. (*Wright* v. *Lukes*, 13 Beav. 107; 20 L. J. 32.) Before the hearing, the application is by motion with notice. Money may be ordered to be paid into court, although some of the persons interested therein are not before the court. (*Wilton* v. *Hill*, 2 De G. M. & G. 807.)

By the 12 Geo. 1, c. 32, the office of accountant-general of the Court of Chancery was created and his duties defined.

By the 28th General Order, 21st December, 1833, it is provided, that in all cases where sums of money or any securities or other effects belonging to the suitors of the Court of Chancery shall be directed to be paid into or deposited in the Bank of England, in the name and with the privity of the accountant-general of the said court; and in all cases where any such sum of money or any securities or other effects be directed to be paid out, or invested in the purchase of securities, transferred or carried over or delivered out, the exact sum of money and amount of securities, so to be paid out, invested, transferred or carried over, be ascertained by the registrar and specified or expressed in the order of court in words written at length, except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes, the amount of

which cannot be ascertained at the time of making the said order, in which cases the order shall direct that the amount of such residues and shares of residues shall be ascertained and specified by affidavit.

That in all cases where a residue of cash or securities shall be directed by any order to be operated upon by the accountant-general, the exact amount of such residue, where the same can be done, shall be ascertained by the registrars, and expressed and specified in the order in words at length, so that the amount of such residues shall appear on the face of the order.

That all persons (whether representatives or others) who shall be directed to pay in, transfer or deposit any sum of money, securities or other effects in the name of the accountant-general, and all persons (whether representatives or others) to whom any sums of money, securities or other effects shall be directed to be paid out, transferred, carried over or delivered out by the accountant-general shall be described by name, except in the case of bodies corporate, companies or societies, in such order, and not merely as plaintiffs or petitioners or the like, except in cases of payments, transfers or carryings over directed to be made to or by representatives, where no probate or letters of administration shall have been taken out at the time of making such orders; and the Christian and surnames or titles of honour of all such persons, and the titles of all such bodies corporate, companies and societies, shall be written at length and without abbreviations in such orders.

That in all orders directing the payment of dividends and annuities, the time when the first of such payments shall be made, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly or otherwise, shall be made, shall be specified and expressed in words at length.

That all orders directing the laying out of sums of money of uncertain amount in the purchase of securities, do direct

that such investments shall be made when the money shall amount to a competent sum, and not sooner.

That in all cases where it shall be referred to a master of the Court of Chancery to ascertain and apportion the amount of money or securities to be paid into the Bank of England in the name and with the privity of the accountant-general, and of any securities to be carried over or transferred to the accountant-general, or to ascertain or apportion the amount of money to be paid out or invested in the purchase of securities to be paid out, or of securities to be sold, carried over or transferred by the accountant-general, the exact amount of such money or securities respectively shall be ascertained by the masters, and stated in the report in words at length; except in the case of residue of money or securities remaining after a portion directed to be applied to certain purposes, and the amount of which portions cannot be ascertained at the time of making such report, in which case the amount of such residue and portions shall be ascertained by affidavit.

That in all cases where a residue of cash or securities shall be directed by an order to be operated upon by the accountant-general, the exact amount of such residue, where the same can be done, shall be ascertained by the masters, and expressed and specified in the order in words at length, so that the amount of such residue shall appear on the face of the order.

And in all such cases, the persons by or to whom money is to be paid, or securities carried over or transferred as aforesaid, shall be described by name, except in the case of bodies corporate, companies or societies, in such report, and not merely as plaintiffs or petitioners or the like; except in the cases of payments, transfers or carryings over directed to be made to or by representatives, where no probate or letters of administration shall have been taken out at the time of making the said report; and the Christian and surnames or titles of honour of all such persons, and the titles

of all such bodies corporate, companies and societies shall be written at full length in the said report.

The order for payment into court should be served, and the copy served indorsed as required by the 12th General Order, April, 1842, and it may be enforced like other orders. (See "*Enforcing Decree or Order.*")

To pay or transfer into court, the order is left at the accountant-general's to prepare a direction to the Bank to receive what is to be paid or deposited. This direction will be ready in two days. The direction being taken to the Bank, the money or securities will be received or transfer made, as the case may be. In the case of a transfer the defendant must attend, or nominate some one by power of attorney, to make the transfer. Bank notes are handed to one of the cashiers at the Bank, being previously marked at the top with the name and address of the solicitor paying them in, and they are by that official cancelled and returned to the solicitor. Cash is paid to one of the tellers, who in return for it gives a ticket for the amount. The cancelled notes and ticket are then taken to the Chancery department in the Bank, where a receipt is given for them. This receipt is then taken to the cashier to be signed, and afterwards left at the accountant-general's office in Chancery Lane. An office copy of the receipt and certificate of payment is afterwards made at the report office, and may be obtained by the solicitor.

By the 36 Geo. 3, c. 52, s. 32 (which act is explained and amended by the 37 Geo. 3, c. 135), it is enacted, that where by reason of the infancy, or absence beyond the seas, of any person entitled to any *legacy*, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this act, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such *legacy* or some part thereof, although he, she or they may have effects for that purpose, or cannot pay such residue, or

some part thereof, although he, she or they may have the same, or some part thereof, in his, her or their hands, it shall be lawful for such person or persons to pay such *legacy*, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant-general shall give his certificate as usual in such cases, on production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid; and such payment into the bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money when paid in shall be laid out by the said accountant-general, without any formal request for that purpose, in the purchase of three pounds per centum consolidated annuities, which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way: provided always, that if it shall afterwards appear that such money, or any part thereof, has been improperly paid into the bank as aforesaid, it shall also be lawful for the said Court of Chancery, upon petition, in a summary way to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require: provided also, that if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, it shall be lawful for the person or persons who shall have paid such duty, to apply to the said commissioners for management of the stamp duties, to repay such excess of duty; and the said commissioners are thereby authorized, upon such application, to repay such excess of duty to the person or persons who shall appear to them entitled to receive the same, or to pay such

excess of duty into the bank, with the privity of the said accountant-general, for the benefit of the person or persons entitled, there to be placed to the same account, and to be applied in the same manner as the same would have been applicable if paid together with the remainder of the *legacy*, or sum of money, in respect of which the same shall have been paid; and the said commissioners are thereby authorized to make such payments respectively out of the monies in their hands arising from duties imposed by this act; and if the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the bank as aforesaid, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said commissioners for such duty out of the money in the bank so paid in by such person or persons, or the produce thereof, which payment the said court is thereby authorized to order.

By the General Order, 4th May, 1852, made in pursuance of the last-mentioned act, the accountant-general is to be at liberty, unless he shall have received, on behalf of some party claiming to be entitled, notice in writing of an intended application to the court for otherwise disposing of the fund, from time to time, to lay out and invest the dividends on such stock, when so purchased, and all accumulations thereon, as the same shall accrue due, in the purchase of like Bank 3*l.* per cent. annuities, without any formal request for that purpose, and place the stock purchased with such dividends to the said several matters and accounts to which the original sums of stock respectively stand; and the accountant-general is to declare the trust thereof when purchased, subject to the order of this court; and for the purposes aforesaid, the accountant-general is to draw on the Bank, according to the forms prescribed by the act of par-

liament and the general rules and orders of this court in that case made and provided.

An order is unnecessary to pay in money under this act, unless the legacy is in stock, in which case an order must be obtained. The course is to pay the legacy duty, and produce the certificate of payment at the accountant-general's office, on bespeaking the necessary direction to the Bank to receive the money, which is then paid in as in other cases.

It would seem that the executor may retain his costs out the interest on the legacy, and pay in the balance.

Where executors invested a legacy less the duty in consols, and tendered the sum produced by sale of the stock, with the interest upon it, to the infant who was entitled to the legacy on her coming of age, the court held, upon bill filed by the legatee, that the executors ought to have paid the legacy into court under the above act, and decreed payment of the legacy, with interest at 4*l.* per cent., and the costs of the suit. (*Rimell* v. *Simpson*, 18 L. J. 55.)

With regard to trustees having trust funds in hand, and wishing to be relieved of them by the court, see "*The Trustees Relief Acts*," and the orders and decisions thereunder, infra.

Payment and Transfer out of Court.—This object is generally and most legitimately effected by petition, the court having a great objection in most cases to direct a payment and transfer out of court on motion; but the direction may be given at the hearing of a cause. It was, however, done by Vice-Chancellor Wood on motion, where the facts appeared on the answers of the defendants, and the plaintiff asked that a sum of 4,000*l.*, part of a sum of 16,000*l.* in court, might be paid to him, all parties having been served with notice of the motion. This application was made under the 15 & 16 Vict. c. 86, s. 57, providing for an allowance being made to parties pending the suit. Where the title to a fund is clear, the order will be made on motion, as if it is carried to a separate account. (*Heathcote* v. *Edwards*,

Jac. 504. See also *Re Bromley*, 13 L. J. 320.) So, if the money be interest and not principal, a motion will suffice. (—— v. ——, 4 Madd. 228.)

In a proper case money will be ordered to be paid out to the solicitor upon his undertaking to see it properly applied. (*Armstrong* v. *Stockham*, 11 Jur. 97. See also *Ex parte De Beaumont*, 13 Jur. 354; *Waddilove* v. *Taylor*, 18 L. J. 406; 13 Jur. 1023; *Ex parte Morrison*, 16 Sim. 42; 17 L. J. 44; 11 Jur. 984.) And where several small sums are payable, the court will order them to be paid to the solicitor upon his undertaking to distribute them; but the petition should be signed by the parties, or a written authority, verified by affidavit, should be produced to the court. (*Kelsall* v. *Minton*, 2 Beav. 361; see also *Downing* v. *Pichen*, 1 Kay, App., 1.)

The rule of the court is not to order payment of money to the solicitor of the party where it exceeds 10*l.*, and this rule will not be deviated from except under very special circumstances. (*Middleton* v. *Younger*, 17 Jur. 664.)

Before petitioners, under an act of parliament for sale of property for public purposes, can receive out of court the purchase-money to which they claim to be entitled, they must, in addition to the usual affidavit verifying their title, make oath "that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person to the sum of £—— in the petition presented by them in the matter mentioned, or any part thereof." (Exchq. Ord., 4th July, 1828; Letter from Lord Chancellor to Senior Registrar, 12th February, 1842.)

In drawing up an order for payment or transfer out of court, the requirements of the 28th General Order, 21st December, 1833, should be observed. (Ante, p. 410.) But where the amount to be paid out cannot be ascertained at the time of the making of the order, that general order does not, as to the specifying the amount, apply. (*Piggot* v. *Garroway*, 9 Sim. 260.)

On the petition by tenant for life and person entitled in

remainder for a transfer of a fund in court, and for the appropriation of sufficient to meet the 1*l.* per cent. succession duty imposed by the 16 & 17 Vict. c. 51, the tenant for life offering to surrender his interest in favour of the latter under the 15th section of that act; the court held that, under the 53rd section, the order might be made on leaving in court 1*l.* 10*s.* per cent. to meet the duty subsequently payable on the death of the tenant for life, the person entitled in remainder undertaking to pay such further sum as might afterwards be required to satisfy the full amount of duty. The court, however, afterwards considered that the better course in a case like that before it would be for the parties to avail themselves of the 41st section, enabling the commissioners to commute future payments, so that the whole fund might be paid out at once, less the amount so commuted. (*Bailey* v. *Tindall*, 22 L. T. 166.)

The General Order of the 9th March, 1854, after discharging that of the 31st January, 1853, which related to legacy duty only, requires that the registrar in drawing up any decree or order whereby the accountant-general shall be directed to pay or transfer any fund or part of any fund in respect of which any duty shall be payable to the revenue under the acts relating to *legacy or succession duty*, shall, unless such decree or order expressly provide for the payment of the duty, direct the accountant-general to have regard to the circumstance that such duty is payable; and where by any decree or order any carrying over to a separate account of any fund in respect of which any such duty may be chargeable shall be directed, the registrar shall add the words "subject to legacy duty," or "subject to succession duty," as the case may be, to the title of the account; and in order the better to provide security against the payment or transfer by the accountant-general of any fund chargeable with any such duty, without the duty being first paid, the accountant-general, on receiving notice from the proper officer that the duty is payable, is to cause a memorandum to be made in his books in conformity with such

notice. And the accountant-general, before executing any decree or order directing the payment or transfer of any fund, or part of any fund, in respect of which any such duty shall be payable, shall require the production of the official receipt for the duty, or a certificate from the proper officer of the payment of the duty chargeable in respect of any such fund or any portion thereof respectively, by any such decree or order directed to be paid or transferred.

A decree for the administration of a testator's estate nor having been prosecuted for sixteen years, the court, upon the oath of the executors that all the debts were paid, and that there were no outstanding claims, ordered payment out of court of the residue to the residuary legatees. (*Harrison* v. *Lane*, 22 L. T. 328.)

By the 16 & 17 Vict. c. 51, s. 53, it is enacted, that whenever any suit shall be pending in any court for the administration of any property chargeable with duty under such act or the legacy duty acts, such court shall provide out of any property which may be in the possession or control of the court for the payment of duty to the commissioners.

When a fund in court is distributable in shares, on an application for payment out of some of such shares, the petition should ask that the other shares may be carried to separate accounts. (*Re Hawkes*, 18 Jur. 33.)

If a *sale of stock* is necessary, the order is taken to the Registrar's Office at the order of course seat, and the certificate of a sale is bespoken. This will be ready the following day; but as a day is sometimes of great importance on the eve of the closing of the offices, the form is here given to enable the solicitor in such cases to prepare it himself, and hand it to the registrar for signature.

Form of Registrar's Certificate of Sale.

To the Accountant-General
of the Court of Chancery.

A. *v.* B.
C. *v.* D.

Pursuant to an order dated the —— day of ——, 1854, two

thousand pounds Bank £3 per cent. Annuities, standing in your name in trust in the first-mentioned cause [*or, as the case may be*], are to be sold with your privity.

This certificate so signed, with the order, is taken to the Accountant-General's Office, and the sale is then bespoken, and when completed the cheques will be prepared for the parties.

In the case of a transfer out of court, the same form was observed, with this addition, that the solicitor writes and signs on the back of the certificate the name, address and description of the transferee. The accountant-general will afterwards prepare and file in the report office a certificate of such transfer.

Where no sale or transfer is directed, the cheques will be prepared on the mere production at the accountant-general's of the order, two or three days being taken for that purpose. The solicitor must attend his client on receiving his cheques to identify him. When the cheques are obtained, they must be countersigned by one of the registrars, or by the master of reports and entries, and endorsed by the party to whom it is payable. A registrar is usually in attendance for the purpose of countersigning cheques in the signing-room at the accountant-general's.

The order or certificate is produced to him at the time, and he places his initials against the amount in the margin. The cheque is then taken to the Chancery department of the Bank of England, and there exchanged for tickets, which the cashiers and tellers will again exchange for notes and cash. The cheque is void if not presented within a month from the date.

Notes and cheques drawn by the accountant-general of this court were formerly entered with the clerks of accounts, and then countersigned by a registrar; but, as already seen, they are now only required to be countersigned by a registrar or by the master of reports and entries. (15 & 16 Vict. c. 87, ss. 34—36.) By the latter section of the same act, the account kept by the clerks of accounts of

monies, securities and effects belonging to the suitors of the court is discontinued, and the offices of the clerks of accounts abolished; and, repealing so much of the order as regulated the former practice now abolished, that section declares that from and after the 1st of October, 1852, every note or cheque for the payment of money under any order of the court, signed by the accountant-general and countersigned by the master of reports and entries, or one of the registrars, shall be sufficient authority to the Bank of England to pay the money mentioned in such note or cheque to the person named therein, or to such person as he or she, by indorsement, shall order to receive the same. The order of the 27th of July, 1852, provides, that until further order, the duty of countersigning such notes or cheques shall be discharged, as nearly as conveniently may be, during three days in each week by the master of reports and entries, and during the other three days in each week by some one of the registrars, in such order and rotation as shall be agreed upon by and between the registrars and the master of reports and entries, or the majority of them; provided that such notes or cheques shall be equally valid and available to all intents and purposes, whether signed by the master of reports or by any one of the registrars.

By the Order of the 28th of July, 1852, it is ordered, that in any case in which the accountant-general shall have been directed to pay to parties to be named in the master's report, and the master shall have reported a sum as due to any persons as personal representatives, the accountant-general shall be at liberty to pay to the survivors or survivor of them.

By the 39th section of the last-mentioned act, the Lord Chancellor is empowered to authorize and direct the first, second and third clerks in each division of the office of the accountant-general, from and after the 28th of October, 1852, to continue to perform the acts or duties hitherto performed by such clerks, in addition to the duties prescribed

by act of parliament, as heretofore in exclusion of any other person, and to direct them to be paid such yearly salaries as the Lord Chancellor, with the consent of the commissioners of her Majesty's treasury, shall think just; and is also empowered to fix the fees to be paid for such acts to be accounted for as other fees received in the office of the accountant-general.

By virtue of this section and other powers the Lord Chancellor has made the 9th of the General Orders of 25th of October, 1852, providing that, subject to the superintendence and direction of the accountant-general, with the approbation of the Lord Chancellor, the first, second and third clerks in each division of the accountant-general's office shall, from and after the said 28th of October, 1852, and until other order or provision in that behalf, continue to perform the acts or duties hitherto performed by such clerks, and which are mentioned in the second schedule to those orders, in addition to the duties prescribed by act of parliament as heretofore; and such fees as are specified in the second schedule thereto are to be paid for such acts, to be accounted for as other fees received in the office of the accountant-general, and to be collected by means of stamps, as provided by the 6th of the same orders; and from and after the 28th October, 1852, no other person shall perform such acts or duties. By the same 9th Order, it is also provided, that in order to enable the Lord Chancellor, with the consent of the commissioners of her Majesty's treasury, from time to time to fix the amount of yearly salaries to be paid to such clerks, the accountant-general shall every six months make a return to the Lord Chancellor of the amount received during the preceding six months in respect of such fees.

By the 41st section of the same act *deposits on appeals and exceptions* for hearing are once in every three months to be paid by the senior registrar into the Bank of England to the credit of the accountant-general (the amount to be

verified by affidavit), and when so paid in, to be from time to time placed to an account to be entitled "The Appeal Deposit Account;" and the monies from time to time standing to such account are to be paid and applied as the court shall from time to time direct.

Where *costs* are directed to be paid *out of a fund in court*, the fees of taxation are not payable as in other cases by means of stamps, but are to be carried over by the accountant-general to the credit of the Suitors' Fee Fund, and to that intent the taxing-master must certify the amount of such fees. (7th G. O., 25th October, 1852.)

When a sum of money in court belongs to a *married woman*, unless the amount is small, the court will not allow it to be paid to her husband without her consent. (*Elliott* v. *Cordell*, 5 Madd. 156.) And frequently a settlement of part at least of a wife's portion is directed. The course is to apply by petition for payment to the husband; but when the sum is small (under 200*l.*) and all parties consent, the order for payment to the husband may be inserted in the decree on further directions. (*Hedges* v. *Clarke*, 1 De G. & S. 354.)

If the court directs any sum or sums of money to be paid, or the master reports any sum of money to be due, to any unmarried woman, and it shall happen that such woman shall be married before the money shall be paid to her, the accountant-general shall, in all cases where it does not amount in the whole to 200*l.* principal, or 10*l.* in annual payment, upon an affidavit being made by any such woman and her husband, stating her marriage, and that no settlement or agreement for a settlement had been made affecting or relating to such sum or sums, draw a draft or drafts for such principal money or annual payment, and make the same payable to such woman or her husband. (Beam. Orders, 464.)

If the wife is under age, her consent will not be accepted by the court (*Stubbs* v. *Sargon*, 2 Beav. 496; *Abraham* v.

Newcombe, 12 Sim. 566); a settlement being required of the husband.

Unless the decree in the cause provides for the payment, a petition is necessary to obtain payment to the husband; and, in addition to the other facts alleged, it must be shown either that there is no settlement or agreement for a settlement whatever, or that the settlement does not affect the sum in question, in which latter case it must be produced for the court to satisfy itself of that fact. (*Rose* v. *Rolls*, 1 Beav. 270.) On the hearing of the petition the wife attends in court and is examined by the judge in reference to the sum to be paid out; but if she resides twenty miles or more from London, the petitioner asks for commissioners to be appointed to examine her as to its application, and upon their certificate and the examination being verified and filed at the report office, a further petition is presented for payment of the money.

By the 13 & 14 Vict. c. 35, s. 28, it is enacted, that, notwithstanding any rule or practice of the said court to the contrary, it shall be lawful for the said court, at the hearing of any cause or of any further directions therein, to receive proof by affidavit of all proper parties being before the court, and of all such matters as are necessary to be proved for enabling the said court to order payment of any monies belonging to any married woman, and of all such other matters not directly in issue in the cause as in the opinion of the said court may safely and properly be so proved.

Investment in Stock, &c.—Generally, to procure an investment of monies paid into court or of the dividends, the order directing it is to be taken to the accountant-general for that purpose. But, by the General Order of the 7th of May, 1852, it is provided, that where, under the "Trustees Relief Acts," the affidavit of the trustee does not contain a statement to the effect that the parties deem it unnecessary to have the money or the dividends or interest of the stock or securities invested in the meantime,

the accountant-general shall be at liberty to invest, as soon as conveniently may be, the said cash in Bank 3*l.* per cent. annuities, in the matter of the particular trust; or in cases of dividends or interest on stock or securities transferred, such dividends or interest in the like stock, and all accumulations of the dividends of the stock in which such cash shall be invested, and of the dividends or interest on such stock or securities as aforesaid, from time to time, in the like matter, without any special order made by the court in that behalf, and without any formal request for that purpose. And the accountant-general is to declare the trust thereof when purchased, subject to the order of this court. And for the purposes aforesaid, the accountant-general is to draw on the Bank, according to the form prescribed by the act of parliament and the general rules and orders of this court in that case made and provided; provided always, that if at any time a request in writing, by or on behalf of any party claiming to be entitled, that such investment be discontinued, shall be left with the accountant-general, he shall be at liberty to cease making any further investment in the matter of the particular trust until the court shall have made some order in that behalf.

So also, as shown at pages 413 to 415, ante, the accountant-general may invest monies paid in under the 36 Geo. 3, c. 52, s. 36, and the accumulations thereon, without any formal request.

The court will not, except in special cases, on the application of a tenant for life, order a fund in court to be invested in any other security than that of consols. (*Darwin* v. *Darwin*, 22 L. J. 1007.)

When an order to invest is necessary, as in most cases it is, any party to the suit may apply by motion or petition, that it may be laid out and invested in government securities for the benefit of the parties interested in the cause. But when it is desired to invest cash already standing to the credit of the cause or matter, and to obtain payment of

dividends, the proper mode of proceeding is by summons. (*Re Hargrave's Estate*, 23 L. T. 139.)

By the 28th General Order of the 21st December, 1833, all orders directing the laying out of sums of money of uncertain amount in the purchase of securities, shall direct that such investments shall be made when the money shall amount to a competent sum. A competent sum is considered to be not less than 40*l.*

It is not now necessary to bespeak investments of interest or dividends from time to time under the same order as formerly, the General Order of the 3rd June, 1853, providing, that in all cases in which an order directing such investment from time to time shall be brought to the accountant-general for the purpose of having such direction for investment carried into effect, he may, from time to time until he shall receive notice of an order to the contrary, without any further request, invest the interest and dividends and accumulations thereon as soon as conveniently may be after they shall accrue due and have been received, as directed by the order, and place the stock or securities purchased to the credit of the cause, matter or account as thereby directed. The order being therefore once produced to the accountant-general, he will take such cognizance of it as to enable him on all future occasions to effect the investment without communicating with the solicitor or party.

This order is prospective only, and it will be necessary, in order to obtain the benefit of it, to take once to the accountant-general the particular orders under which he is from time to time to invest. The fact of an order having been taken at some time previous to the promulgation of the General Order, is not such a notice as will enable the accountant-general to invest without request.

Brokerage.—From and after the 28th October, 1852, the brokerage from time to time to be received by the accountant-general is to be paid by him on the first day of every

month, or as soon after as conveniently may be, into the Bank of England, to his credit as such accountant-general, to the account entitled the "Suitors' Fee Fund Account. (8th G. O., 25th Oct. 1852.)

Where a sum of money is invested under the Lands Clauses Consolidation Act, the accountant-general deducts the brokerage from the sum, and the company pays the amount of brokerage to the petitioner. (*Ex parte Harborough*, 17 Jur. 1045; 22 L. T. 115.)

Fees.—By the operation of the General Orders of the 25th October, 1852, a number of fees formerly payable in the accountant-general's office are abolished. These are in relation to the payment, transfer and investment of monies, stock and securities and carryings over to separate accounts, and are contained in the first schedule to those orders.

The following are the fees by the last-mentioned orders directed to be taken in that office by means of stamps:—

	£	s.	d.
1. For preparing English power of attorney with affidavit, exclusive of stamp duty	0	3	0
2. For preparing foreign power of attorney, without affidavit	0	3	0
3. For special power of attorney	0	5	0
4. For copies of accounts, debtor and creditor's side, per folio, as to be explained by general order [*See note below as to Orders supeseding this charge.*]	0	0	3
5. Upon every application for a search	0	5	0

The above item (4) is no longer accurate, the charge being altered as follows:—

From and after the 2nd July, 1854, the charge for all transcripts of accounts made in the office of the accountant-general shall be after the rate of 2*s.* for each opening of such transcript consisting of the debtor and creditor sides of the account to be entered therein. (2nd G. O., 21st June, 1854.) To be paid by means of stamps. (3rd ibid.)

Where money was asked to be paid out of court to an attorney, under a power of attorney from the party entitled, the court of appeal held that his signature was not suf-

ficiently attested by the certificate of a notary public under hand and seal and the official seal of the mayor of the foreign city where he resides, but the same must be proved by affidavit. (*Salvidge* v. *Tutton*, 22 L. J. 883.)

Carrying over.—When cash or stock is directed to be carried over from one cause or account to another, the accountant-general signs a certificate to the Bank, directing the same to be done. The Bank then send a certificate to the accountant-general's office of such carrying over having been effected, and the accountant-general then signs another certificate thereof, annexes it to the Bank certificate, and files it in the report office.

By the "Chancery Suitors Further Relief Act," (16 & 17 Vict. c. 98), section 1, the Lord Chancellor is enabled, at such time within nine calendar months after the passing of that act as shall appear to him to be most convenient, to cause an investigation to be made into the several accounts standing in the name of the said accountant-general to the credit of any cause or matter the dividends of which shall not have been dealt with for fifteen years or upwards prior to such time, and if and when he shall be of opinion that it is not probable that any claim will be made for the same, to make orders for the appropriation of the future dividends to accrue due on such stock, or such part of such dividends as he shall be of opinion may safely and properly be so appropriated, as the same shall accrue, for the benefit of the suitors of the said court, and for the carrying the same over to the credit of an account to be entitled "The Suitors Unclaimed Dividend Account," and for the carrying from time to time such part of the cash standing to the last-mentioned account as he may think fit over to the credit of the account in the books of the said accountant-general called "The Suitors Fee Fund Account," and such dividends when so carried over shall thereupon become part of the fund standing to such account.

And the 3rd section gives a similar power to the Lord Chancellor to be exercised at the expiration of every five years from such first investigation, the same course to be pursued in each case, and the same rights are preserved as in the first instance, and the same power is given as to fees.

The 2nd section provides, that the right of any suitor of the said court to the stock the dividends of which shall be appropriated by any such order or orders as are mentioned in the 1st section, or to the dividends so directed to be appropriated, shall not be in anywise prejudiced or affected by such order or orders, or by such appropriation in pursuance thereof as aforesaid, but the claims of such suitor or suitors shall be made good and satisfied out of the fund standing to the credit of the accounts called "The Suitors' Fee Fund Account" and "The Suitors' Unclaimed Dividend Account," or either of them, by virtue of any order or orders to be from time to time made by the said court for that purpose; and if and when it shall become necessary for the purposes aforesaid, it shall be lawful for the Lord Chancellor, by any order or orders to be from time to time made for that purpose, to impose such fees in relation to proceedings in the said Court of Chancery as to him shall seem meet, and to direct that such fees shall be collected by means of stamps, to be provided and used in the manner now adopted with reference to fees collected by means of stamps in the said court, and to alter, diminish or abolish such new or additional fees, as circumstances may from time to time warrant him in so doing.

The 4th section enacts, that the dividends and annual produce which have arisen and which shall arise from the monies placed out on the account entitled "Account of Monies placed out to provide for the Officers of the High Court of Chancery," shall be carried over by the said accountant-general and be placed to the account entitled "The Suitors' Fee Fund Account," and shall thereupon become part of the fund standing to such account, and be dealt with accordingly.

Powers of attorney must bear a 30*s.* stamp (not a Chancery stamp) besides the fee payable at the accountant-general's, except in the following cases.

By the 5th section of the last-mentioned act it is enacted, that from and after the passing of this act the stamp duties which if that act had not been passed would have been payable on letters or powers of attorney to be used in the office of the said accountant-general for the receipt of cheques, notes or drafts for gross sums of money not exceeding the sum of 20*l.*, or periodical payments not exceeding the annual sum of 5*l.*, shall cease to be payable, and shall be and the same are thereby repealed, and in lieu and instead thereof there shall be granted, raised, levied and collected in respect of every such letter or power of attorney, or for or in respect of the vellum, parchment or paper upon which the same shall be written, the sum of 5*s.*

The 6th section declares, that the duties by that act to be raised shall be deemed stamp duties, and be under the management of the Commissioners of Inland Revenues, with similar powers and provisions as in the case of other stamp duties.

The 7th section enables the Lord Chancellor, whenever it shall seem expedient to him so to do, to empower and direct the accountant-general of the said court to receive and act upon letters or powers of attorney granted by any person to whom any sum or sums of money shall by any order in any cause or matter be directed to be paid, authorizing the attorney of such person to receive, not only a cheque, note or draft for the sum or sums of money so ordered to be paid, but all cheques, notes or drafts for any further or other sum or sums of money which by any order or orders to be thereafter made in the same cause or matter, or any cause or matter connected therewith, shall be ordered to be paid to such person or persons by or out of any fund then or thereafter to be standing to the credit of such cause or matter; and the Lord Chancellor shall by order make such provision

as he may deem necessary for satisfying the accountant-general of the identity of the person named in two or more orders.

Stop-Order—Charging Order.—Any person, though not a party to the suit, who has become interested in a fund in this court, may apply by petition for an order that such fund may not be paid out without notice to the petitioner. But where the assignor and assignee concur, the order may and should be obtained from the judge at chambers upon a summons issued for that purpose. If the assignor do not assent to the order, the petitioner must prove his title. The petition must be served on the assignor (*Parsons* v. *Groome*, 4 Beav. 521), and so must the summons; but not upon the parties to the cause, or persons interested in parts of the stocks or funds not sought to be affected by the order. (G. O. 3rd April, 1841.)

The last-mentioned General Order also provides, that in all cases where any stocks or funds are or shall be standing in the name of the accountant-general of the court, to the general credit of any cause, or to the account of any class or classes of persons, and an order shall be made to prevent the transfer or payment of such stocks or funds or any part thereof, without notice to the assignee of any person or persons entitled in expectancy or otherwise to any share or portion of such stocks or funds, the person or persons by whom any such order shall be obtained, or the shares of such stocks or funds affected by such order, shall, at the discretion of the court, be liable to pay any costs, charges and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or any person interested in any such stocks or funds.

This petition is brought on in the usual way, and an affidavit of service should be filed as in other cases. When the order is completed, it is served at the accountant-general's, and a memorandum is then made in his books. He

may also require a copy. It should also be served on the assignor.

By virtue of the acts 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, a judgment creditor, upon applying to a common law judge, may obtain a charging order against stock or shares in a public company belonging to his debtor, or funds standing to the credit of the cause or matter in chancery.

A solicitor entitled to costs out of a fund in court assigned his interest therein to a creditor, after which another creditor obtained a charging order which was made absolute, then the first creditor obtained a stop-order, and afterwards the second creditor obtained a stop-order ;—a third creditor took a similar course to the second, and each served the accountant-general with copies of their orders ; the court held that the first creditor, by taking an assignment and obtaining a stop-order, became entitled to payment, the charging order giving no priority, but merely operating to restrain a transfer between the order nisi and the order absolute. (*Ex parte Perrin* and *Guildford, Warburton* v. *Hill; Stent* v. *Wickens*, 2 Eq. Rep. 442; 1 Kay, 470; 23 L. J. 633; see also *Greening* v. *Beckford*, 5 Sim. 195.)

A cheque drawn by the accountant-general in favour of a person entitled to money in court, but not delivered out to him, is not that person's property, so as to be liable to seizure by the sheriff under the 1 & 2 Vict. c. 110, s. 12; and leave to seize such a cheque was refused, but the court granted a stop-order. (*Courtoy* v. *Vincent*, 15 Beav. 486; 21 L. J. 291.)

After a charging order this court will grant a stop order against a fund in court, to secure payment of an annuity to the debtor, though six months have not elapsed from the date of the charging order, that being the time mentioned in section 14 of the act 1 & 2 Vict. c. 110, during which no proceedings shall be taken to have the benefit of the charge. *Watts* v. *Jefferyes, Ex parte Reece*, 17 L. T. 281.)

PART III.

MISCELLANEOUS SUBJECTS OF PRACTICE.

BILL OF DISCOVERY.

It is no longer true that every bill is a bill of discovery, many bills not requiring any answer; but a bill of this description may be filed by a defendant who, in an action at law, or in other respects, is so situated that he cannot properly defend himself in court without this aid. The 14 & 15 Vict. c. 99, however, affords the assistance so much required by defendants at law, by providing for the examination of parties to a suit or action. Under this act the parties at law being examined vivâ voce in open court, a much greater security is afforded to a defendant at law than he could obtain from a bill of discovery, the answer to which is seldom available for the purpose for which it was required. The same act provides for production and inspection, and taking copies of documents in the action at law, and procuring them to be duly stamped. (See also the 17 & 18 Vict. c. 125.) A bill of discovery may, however, be filed without any action being brought.

Sometimes an affidavit of the plaintiff must be annexed to the bill, as where it is for the discovery of documents, and prays also for such relief as might be obtained at law if they were in the custody of the plaintiff. In such cases the affidavit should be that they are not in his custody or power, and that he does not know where they are, unless they are in the custody or power of the defendants, or one of them. The affidavit is not necessary when the bill prays equitable relief only. (Mitf.)

By the 41st General Order, August, 1841, the costs of a cross bill of discovery only, and of the answer thereto, were declared to be in the discretion of the court at the hearing of the original cause; and by the 42nd General Order, August, 1841, the answer to such a bill may be read and used by the party filing such bill, in the same manner, and under the same restrictions, as the answer to a bill praying relief. And the 125th General Order, 8th May, 1845, declares that the costs of a bill of discovery filed by a defendant to a bill for relief are to be costs in the original cause, unless the court otherwise orders.

A cause in which the bill is merely for discovery does not proceed to a hearing, and cannot be dismissed for want of prosecution after answer. But the defendant may, after the expiration of the time for filing exceptions thereto, obtain an order of course for his costs of suit. (*Rhodes* v. *Hayne*, 9 Jur. 175.) It is, however, otherwise when a commission issues for the examination of witnesses, as that must be first returned before the order for costs can be obtained, but if the defendant examines in chief, instead of cross-examining only, he is not entitled to his costs. (—— v. ——, 8 Ves. 69.) When the plaintiff delays examining witnesses beyond a reasonable time, the defendant may move that the plaintiff may proceed to perfect his evidence within a stated time, or that he may be ordered to pay the defendant's costs. (*Wright* v. *Tatham*, 2 Sim. 459.)

BILL OF INTERPLEADER.

This description of bill is filed when a person has several claims upon him for the same thing, and fears to pay or render it to one, lest another should prove to have a better title to it. An affidavit that the plaintiff is not in collusion with any other party must be annexed to this bill, otherwise it may be demurred to. A demurrer was allowed when the affidavit was made by the plaintiff's solicitor. (*Wood* v. *Lyne*, 4 De G. & S. 16.) Collusion will not be presumed against this affidavit, nor will a counter affidavit be allowed.

(*Langston* v. *Boylston*, 2 Ves. 101.) Upon the filing of the bill the court will grant an injunction ex parte, if necessary, to stay proceedings at law. The plaintiff should offer, by his bill, to bring the money or other property, the subject of the suit, into court, and this will afterwards be ordered on motion for that purpose. It is no objection to the bill that it is filed after verdict at law, where the effect of the action was to ascertain the quantum of damages due to the plaintiff at law, who was a defendant in equity. (*Hamilton* v. *Marks*, 5 De G. & S. 638.) The plaintiff proceeds with his suit as in other cases, replies to the answers, and, after publication passes, sets down the cause for hearing, and is not entitled to his costs before the hearing (*Jones* v. *Gilham*, Coop. 49), at which stage he may be considered as no longer a necessary party to the suit. After a decree, the death of an interpleading plaintiff does not abate the suit (Mit. Pl.); and if a trial at law is directed between the defendants at the hearing, the suit is ended as to the plaintiff, and his death will have no effect on the progress of the cause. (—— v. ——, 1 Vern. 351.) Each defendant may take copies of the answers of the other defendants, and is entitled to read them on the hearing, and such copies will form part of his costs. The plaintiff is entitled to his costs out of the fund, but the court will adjudge the costs among the defendants.

FORECLOSURE AND REDEMPTION.

A foreclosure suit is the means whereby a mortgagee induces the court to bar the right to redeem the mortgaged property, or to obtain payment for him of his principal, interest and costs, and a redemption suit is that where the person entitled to redeem enforces that right. These suits are now most frequently instituted by claim instead of by bill, as was formerly always the case. (See "*Proceedings for Plaintiffs by Claim*," ante.) The General Orders of 22nd April, 1850, give the power of adapting this description

of suit to a "legal or equitable mortgagee, or person entitled to a lien as security for a debt, seeking foreclosure or sale, or otherwise to enforce his security;" and also to "a person entitled to redeem any legal or equitable mortgage, or any lien, seeking to redeem the same." (Order 1.) Special cases, not within the 1st Order, are provided for by the 6th, and in these cases leave of the court must be obtained before the claim is filed. (See "*Proceedings for Plaintiffs by Claim.*")

With regard to the parties to a foreclosure suit, see ante, "*Proceedings for Plaintiffs by Bill,*" and "*Proceedings for Plaintiffs by Claim.*"

The suit is prosecuted to a hearing as other suits, when the court directs an account of principal, interest and costs due to the plaintiff. This direction is prosecuted in the ordinary way in the judge's chambers, and the costs are taxed by the proper taxing master. The time mentioned for payment of what is found due is six months, and on the day and at the hour appointed the mortgagee, or some person duly appointed by power of attorney, must attend to receive the money, and the mortgagor must attend also if he desired to redeem his property. An infant, however, is allowed a day to show cause against the decree after attaining his majority (*Mallack* v. *Galton*, 3 P. W. 352; *Price* v. *Carver*, 3 M. & C. 157), not, however, by unravelling the accounts, or redeeming the property, but only by showing error in the decree. (*Mallack* v. *Galton*, supra.) The decree bars the right of a married woman entitled to the equity of redemption, where the suit is against her and her husband, and she is not allowed a day to show cause after her husband's death. (Ibid.) The mortgagee having, by mistake, omitted to attend at the time and place appointed for payment, the court appointed a new time and place ten days after the date of the order, but in such case the mortgagee is not entitled to subsequent interest. (*Hughes* v. *Williams*, 1 Kay, App., 4.)

The 7 Geo. 2, c. 20, s. 2, provides, that where the right of

redemption is not controverted, and the subsequent mortgagees would not be prejudiced, the court may, on defendant's application, he having a right to redeem and admitting the plaintiff's title, at any time before the hearing make such order or decree therein as it could have made if the cause had been regularly brought to a hearing, and all parties shall be bound thereby. This order cannot be obtained where one of the defendants is an infant, as all parties must admit the plaintiff's title (*Lushington* v. *Price*, 9 Sim. 651; *Taylor* v. *Coates*, 3 Hare, 263), and the bill must be a bill of foreclosure merely. (*Bastard* v. *Clarke*, 7 Ves. 489.) The motion may be made without answer. (*Piggin* v. *Cheetham*, 2 Hare, 80.)

After a foreclosure decree and accounts taken, it was held that the mortgagees could not, by petition, obtain an order to add to their security, further costs incurred in another proceeding. (*Barron* v. *Lancefield*, 17 Beav. 208.)

If a proper case is made out for that purpose, the security being sufficient, the court may from time to time enlarge the time for payment (*Edwards* v. *Cunliffe*, 1 Madd. 287), even though the order absolute has been enrolled. (*Ford* v. *Wastell*, 2 Phil. 591; 17 L. J. 368; 12 Jur. 404.) See also *Thornhill* v. *Manning* (20 L. J. 604), affirming the Vice-Chancellor's jurisdiction in such a case. The order is made on motion with notice; and is usually granted, if at all, on condition that the interest and costs already reported due be paid, and a further account is directed of subsequent interest and costs.

In the event of the plaintiff not being paid the amount found due for principal, interest and costs at the time appointed, upon an affidavit of his due attendance, and of non-payment, he is entitled to an order, on motion of course, absolutely foreclosing the equity of redemption. But not if he receives rents between the date of the report and the time for payment, as in such case a fresh account must be taken, and a new day fixed for payment. (*Alden* v. *Foster*, 5 Beav. 592.)

But now in some cases there may be a sale directed by the court without giving the usual time to redeem.

In any foreclosure suit the court may, upon the request of the mortgagee or any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, direct a sale of the mortgaged property instead of a foreclosure, on such terms as it may think fit to direct, without previously determining the priorities of incumbrances, or giving any time to redeem, but not without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request. (15 & 16 Vict. c. 86, s. 48.) The form of an order made under this section on the hearing of a claim was as follows:—"Take an account of the principal and interest due, and tax the costs of all parties except the mortgagor; and one month after the judge's clerk shall have made his certificate of the amount, if the principal, interest and costs shall not be paid, let the estate be sold and the proceeds of the sale paid into court with usual directions." (*Staines* v. *Rudlin*, 16 Jur. 965.) The Master of the Rolls has said that a sale instead of a foreclosure will not in general be ordered, unless there is such complication that the common decree cannot be conveniently worked (*Hiorns* v. *Holtom*, 16 Jur. 1077), or unless it is manifestly for the benefit of all parties. (*Hurst* v. *Hurst*, 22 L. J. 538.) The mortgagor's consent is necessary, except under special circumstances. (*Probert* v. *Price*, 1 Eq. Rep. 51.) The Lords Justices, however, directed an immediate sale at the plaintiff's request. (*Cator* v. *Reeves*, 16 Jur. 1004.) But this was refused by Vice-Chancellor Stuart, the mortgagor who had appeared to the suit not appearing at the hearing. (*Smith* v. *Robinson*, 22 L. J. 482; 20 L. T. 205.) So also was it refused by the Master of the Rolls, the defendant objecting to a sale. (*Bell* v. *Carter*, 17 Jur. 478.) Where it is clearly for an

infant's benefit, his estate will be ordered to be sold without giving time to redeem. (*Mears* v. *Best*, 10 Hare, App., 51.) The sale must be asked for at the hearing, for if a decree be made for a foreclosure, it cannot afterwards on motion be converted into a decree for a sale. (*Girdlestone* v. *Lavender*, 16 Jur. 1081.) The court has no power to order it on interlocutory application, but only where, before the act, foreclosure might have been decreed. (*Wayn* v. *Lewis*, 1 Drew. 487.) But see *Laslett* v. *Cliffe* (23 L. T. 167), where a sale was directed upon a petition by the mortgagor after a decree for foreclosure had been made.

On foreclosure of an equitable mortgage of copyhold property, the mortgagor, being the person to take the necessary steps to surrender, must pay the expense thereof. (*Pryce* v. *Bury*, 2 Drew. 41; 17 Jur. 1173.)

By the 4th General Order of 9th May, 1839, it is provided that foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing under the same circumstances, and subject to the same rules, as other causes may be ordered to be so advanced. This order relates only to "advancing" causes, but see "*Setting down Cause*," as to the power to mark a cause as "short." It was decided that the costs of a motion under the above order to advance the cause must be borne by the plaintiff. (*Browne* v. *Lockhart*, 10 Sim. 420.) If a defendant disclaims he will be foreclosed, and not merely dismissed (*Perkin* v. *Stafford*, 10 Sim. 562); and if he properly disclaims the plaintiff will be ordered to pay his costs and add them to his debt. (*Silcock* v. *Roynon*, 2 Y. & Coll. 376; 7 Jur. 548.) But there may possibly be cases where it may be necessary to retain the defendant before the court without regard to his disclaimer, and where he may not be considered entitled to his costs.

BILL OF REVIEW.

A bill of review may be filed when a decree is sought to be reversed, wholly or partially, after enrolment, when a rehearing cannot be had nor a supplemental bill filed. I

should be brought within twenty years from the date of the decree. It may be either for error in law, apparent on the decree, or upon supplemental facts come to the knowledge of the party. The mere propriety of the decree cannot be questioned by a bill of review; it is only where there is error on the face of it that such a bill can be sustained. (*Haig* v. *Homan*, 8 Cl. & Fin. 320); and if for error apparent, errors of form only, and not of judgment, can sustain it. (*Trulock* v. *Robey*, 2 Phil. 395; 11 Jur. 999.)

If the bill is brought on discovery of new matter, leave to file it is necessary; but not so if for error apparent. (*Gould* v. *Tancred*, 2 Atk. 534.) For the purpose of obtaining leave, a petition must be presented, and the court must be satisfied of the right of the party existing, and that the new matter could not have been brought forward by the party applying before the decree was made. (*Wortley* v. *Birkhead*, 2 Ves. 571.) But when a person not a party to the suit is aggrieved by a decree made in his absence, and afterwards served upon him, so as to attempt to bind him in subsequent proceedings, he must move on notice for leave to file a bill, in the nature of a bill of review. (*Kidd* v. *Cheyne*, 18 Jur. 348; 23 L. T. 20.) If the court is satisfied that the new evidence will not affect the former decision, the application will be refused. (*Hungate* v. *Gascoigne*, 2 Phil. 25; 10 Jur. 625.) The application may be granted, though the new matter was not capable of being used as evidence of anything at issue in the original cause. (*Partridge* v. *Usborne*, 5 Russ. 195.) If the new matter might have been known to the party applying, if reasonable diligence had been used, the application will be refused. (*Young* v. *Keighley*, 16 Ves. 348.) A bill of review may be brought upon a bill of review, the decree upon which reverses the original decree (Mitf. Pl.), but not upon a decree taken by consent. (*Webb* v. *Webb*, 3 Swanst. 658.)

A deposit of 50*l.* is required to be made with the registrar before filing the bill, to be disposed of as the court shall

award (Beam. Ord. 4, 313, 366), and the party seeking to file it must have performed the decree on his part as far as practicable (*Partridge* v. *Usborne*, supra); otherwise, if filed, it may, on motion of the defendant, be ordered to be taken off the file, with costs, or the court may order proceedings to be stayed until the decree is complied with.

A bill, the frame of which is not that of a bill of review, to set aside a decree, but which seeks, by varying it, to establish and confirm it, is one upon which the court can grant relief, if the case does not otherwise fail. (*Stone* v. *Godfrey*, 22 L. T. 20.)

The defence may be by plea or demurrer, or by answer, if necessary—a plea of any matter necessary to be brought forward, and not on the face of the bill, or a demurrer to the opening of the enrolment of the decree. (*Gould* v. *Tancred*, 2 Atk. 534.) The overruling of the demurrer is generally equivalent to granting the prayer of the bill, unless it be on the ground of new facts, in which case an answer may be required, and the allowance of the demurrer is a confirmation of the decree. In either case, therefore, the proceedings are terminated.

If a decree is sought to be reversed by supplemental bill, there must be a petition of appeal or rehearing, which will come on for hearing with such supplemental bill. (*Moore* v. *Moore*, 2 Ves. 598; and see also *Perry* v. *Phelips*, 17 Ves. 173.)

BILL TO PERPETUATE TESTIMONY.

This bill is filed when there is danger of the testimony of any witness being lost, by death or otherwise, before the time arrives for the matter to which it relates to be judicially investigated. It does not pray any relief, and the cause terminates with the examination of witnesses. It must state that no action can be immediately brought; otherwise it is demurrable. (*Angell* v. *Angell*, 1 S. & S. 83.)

The 5 & 6 Vict. c. 69, s. 1, provides, that any person who

would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of this act, to file a bill in the High Court of Chancery to perpetuate any testimony which may be material for establishing such claim or right; and that all laws, rules and regulations not contrary to the provisions of this act, now in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force and used and applied in all suits to be instituted under the authority of this act, and in respect to depositions taken in such suits.

The 2nd section provides, that in all suits which may be so instituted under the authority of this act, touching any honour, title, dignity or office, or any other matter or thing in which her majesty, her heirs or successors, may have any estate or interest, it shall be lawful to make the attorney-general for the time being a party defendant thereto; and that in all proceedings in which the depositions taken in any such suit in which the attorney-general for the time being was so made a defendant may be offered in evidence, such depositions may be admissible notwithstanding any objection to such depositions upon the ground that her majesty, her heirs or successors, were not parties to the suit in which such depositions were taken.

Of course the object of the suit is to obtain evidence; and therefore, if the defendant is attached and still refuses to answer, the court will order the examination of witnesses. (*Lancaster* v. *Lancaster*, 6 Sim. 439.)

If the defendant answers, replication should be filed, and the examination of witnesses proceeded with as in other cases.

The general rule was that the depositions should not be published, until after the death of the witness, or unless he were sick or incapable of travelling, or prevented by accident from attending to be examined. (*Morrison* v. *Arnold*, 19 Ves. 671; *Barnsdale* v. *Lowe*, 2 R. & M. 142.) Depositions of deceased witnesses may be published, and those of living witnesses in the same case withheld. (*Abergavenny* v. *Powell*, 1 Mer. 434.)

If the plaintiff does not proceed with his suit, the defendant may move to compel him to file replication forthwith, and to proceed to examine witnesses and complete the same within a stated time, or in default, that he should pay the defendant's costs of suit (*Beavan* v. *Carpenter*, 11 Sim. 22); or, after replication, that plaintiff may proceed to perfect the examination of his witnesses within a stated time, or in default, that he may pay the defendant's costs of suit. (*Wright* v. *Tatham*, 2 Sim. 459.)

When the examination of witnesses is completed, the defendant may apply for his costs upon the simple allegation that he did not examine any witnesses. (*Foulds* v. *Midgley*, 1 V. & B. 138.) This is a motion of course.

The order to publish the depositions when they are required is obtained by motion on notice, supported by evidence that they are necessary, and showing that the witnesses cannot be procured for examination, either from death, infirmity or otherwise.

SPECIFIC PERFORMANCE.

When the specific performance of an agreement is required, this court has power to order it, upon a proper case being made out for that purpose; but not unless it can execute the whole agreement. (*Hills* v. *Croll*, 9 Jur. 645.)

This kind of suit may now be brought in the form of a claim under the General Orders of 22nd April, 1850, which provided that a person entitled to the specific performance of an agreement for the sale or purchase of any property seek-

ing such specific performance may adopt that form of suit. (Order 1.) Where this order does not exactly fit the case, the 6th Order provides for the filing of what is termed a special claim, first obtaining the leave of the court for that purpose. (See ante, "*Proceedings for Plaintiff's by Claim.*")

In a claim for specific performance of an agreement by a railway company to purchase land from trustees, the persons beneficially interested are not necessary parties. (*Potts* v. *The Thames Haven Dock Railway Company*, 15 Jur. 1104.)

An infant cannot sustain a suit of this description, because the remedy is not mutual. (*Flight* v. *Bolland*, 4 Russ. 298.)

When the plaintiff fails at the hearing to prove his title to decree upon a point not raised by the pleadings, the court dismisses the bill without prejudice to his filing another bill. (*Clay* v. *Ruffard*, 5 De G. & S. 768.)

When the suit is by bill a reference as to title may be obtained on motion with notice before answer, if the title be the only question in dispute (*Balmanno* v. *Lumley*, 1 V. & B. 224), but not otherwise. (*Gordon* v. *Ball*, 1 Sim. & S. 178.) The reference has the effect of a decree so as to prevent a motion to dismiss for want of prosecution. (*Biscoe* v. *Brett*, 2 Ves. & B. 377.) Whether the reference be made before or at the hearing, the terms are to inquire not only whether a good title can be made, but when first a good title was shown. (—— v. ——, 3 Madd. 495.) Upon this point depends the question of costs, the vendor having, generally, to pay costs up to the report of such a title, if the title be not shown before suit. (*Harford* v. *Purrier*, 1 Madd. 532.) The rule that the costs depend upon when the title was first shown is to be strictly adhered to. (*Wilkinson* v. *Hartley*, 15 Beav. 183.) But this must be taken to mean where the title is the subject of dispute, and not where the performance of the contract is refused by the purchaser upon another ground. See *Abbott* v. *Sworder*, 22 L. J. 235, where the purchaser was made to pay the costs of the reference, though the title was first shown after the date of the decree; and *Abbott* v. *Calton*, 22 L. J., 936, where the purchaser was held liable

to the costs of suit, except the costs of making out the vendor's title, which was done after decree. But when a vendor succeeds in the suit occasioned solely by the conduct of the defendant, he is entitled to costs, although the title was first shown in the master's office. (*Peers* v. *Sneyd,* 17 Beav. 151.)

The vendor may obtain a decree if he can show a good title at any time before the report is made. (*Mortlock* v. *Buller,* 10 Ves. 315.)

The order is carried into the judge's chambers in the usual way, and a summons taken out (see "*Proceedings in Chambers,*" *&c.*), as in other cases. The abstract being left, the investigation of the title will proceed as pointed out under the heading "*Investigation of Title.*"

PARTITION.

This court interferes to divide land between parties entitled thereto in proportionate parts, where they cannot themselves agree upon a division.

By the act 4 & 5 Vict. c. 35, s. 85, it is provided, that from and after the passing of that act, it shall be lawful for any court of equity in any suit to be thereafter instituted therein for the partition of lands of copyhold or customary tenure, to make the like decree for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a commission for the partition of the same lands and the allotment in severalty of the respective shares therein, as according to the practice of such court might then be made with respect to lands of freehold tenure.

This suit is prosecuted in the same way as any other up to decree, when the court either declares the rights of the parties or directs an inquiry as to such rights. It can now, however, be by claim instead of by bill. (*Brace* v. *Foulkes,* 18 L. T. 220.)

The legal estate must be before the court (*Miller* v. *Warmington,* 1 J. & W. 493), and the minuteness of interest, inconvenience, difficulty, or reluctance of other tenants in

common are not sufficient objections to this bill. (*Baring* v. *Nash*, 1 V. & B. 554; *Warner* v. *Baynes*, 2 Amb. 589.)

Either on the original hearing, or on further consideration, a partition is decreed, and for that purpose a commission is directed to issue to divide the estate. If the parties cannot agree upon the commissioners to be appointed, they must join in commission and strike commissioners' names. The plaintiff, and also each set of defendants, names four commissioners. The commission bears a 20*s*. Chancery stamp, and is returnable without delay. It is issued by the record and writ clerk to whose division the cause belongs, upon a præcipe being handed him, together with the order authorizing it to issue. In executing this commission, the commissioners examine witnesses, who may be cross-examined by or on behalf of the parties who should be in attendance.

On a partition, every part of an estate need not be divided, but it is sufficient if each party is allotted his equal share of the whole. (*Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446.) Sometimes the commissioners may find it necessary to draw lots, but this should only be done when there are no circumstances to induce them to allot the portions otherwise; when the commissioners differ, they should make separate returns. (*Canning* v. *Canning*, 18 Jur. 640; 23 L. T. 251.)

The commissioners' return, which details their proceedings, is engrossed on parchment and signed, and is then, together with the commission, interrogatories and depositions, sealed up by any two or more of them. The whole are then returned to the office of records and writs whence it issued. There are some useful directions contained in Seton on Decrees respecting the powers and duties of commissioners on the execution of this commission. The certificate or return of the commissioners is afterwards to be confirmed by orders nisi and absolute, and the cause again set down for hearing, when the necessary conveyance will be directed by the court according to the allotment.

Where the commissioners made two different returns, each

signed by two commissioners, the court refused to act upon either, and directed a fresh commission to issue to five commissioners. (*Watson* v. *Duke of Northumberland*, 11 Ves. 153.) The court cannot prefer one return to another. (*Corbett* v. *Davenant*, 2 Bro. C. C. 251.)

Exceptions will not lie on the ground of inequality of the value of the lots; in all cases of improper conduct on the part of the commissioners, the party dissatisfied should move to suppress the return. (*Jones* v. *Totty*, 1 Sim. 136.)

The rule as to costs seems to be that none are given to any party, up to the issuing of the commission nor after the return and making out of the title to the different parts of the whole. (2 Eq. Ca. Ab. 237; *Baring* v. *Nash*, 1 V. & B. 555; *Agar* v. *Fairfax*, 17 Ves. 533.) And the costs of the commission, and of making out the title, are paid by the parties according to the values of their respective interests. (*Calmady* v. *Calmady*, 2 Ves. 567a; *Baring* v. *Nash*, *Agar* v. *Fairfax*, supra.) But when a party improperly occasions expenses in the suit, the above rule will be departed from, and costs given against him. (*Hill* v. *Fullbrook*, Jac. 574.) When the solicitor to the Suitors' Fee Fund was appointed guardian ad litem to an infant party, the plaintiff was ordered to pay the infant's costs, and to charge them on his share. (*Robinson* v. *Aston*, 9 Jur. 224.)

The commissioners have no lien on the commission for their charges. (*Young* v. *Sutton*, 2 V. & B. 365.)

SPECIAL CASE.

The practice of submitting a special case for the opinion of the Court of Chancery was created by the act 13 & 14 Vict. c. 35, known as Sir George Turner's Act, which, under the 35th section, commenced and took effect from and after the first day of November, 1850.

By the 1st section of the act it is provided, that it shall be lawful for persons interested or claiming to be interested in any question cognizable in the Court of Chancery as to the construction of any act of parliament, will, deed or

other instrument in writing, or any article, clause, matter or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties to or the form of any deed or instrument for carrying any such contract into effect, or as to any other matter falling within the original jurisdiction of the said court as a court of equity, or made subject to the jurisdiction or authority of the said court by any statute not being one of the statutes relating to bankrupts, and including among such persons all lunatics, married women and infants, in the manner and under the restrictions hereinafter contained, to concur in stating such question in the form of a special case for the opinion of the said court, and it shall also be lawful for all executors, administrators, and trustees to concur in such case.

The Master of the Rolls has held that a special case is only proper for the purpose of obtaining the opinion of the court in cases of doubtful construction; that it is not similar to a suit, as the court has no power to bind the rights of parties; and in the case then before him, his honor declined to give any opinion upon two points involving disputed rights. (*Bailey* v. *Collett*, 23 L. J. 230; 22 L. T. 313.)

Persons under Disability, how enabled to concur.

Lunatic.—By the 2nd section, the committee of the estate of any lunatic interested or claiming to be interested in any such question as aforesaid may, after having been authorized in that behalf by the Lord Chancellor, concur in such case in his own name and in the name and on the behalf of the lunatic.

Married Woman.—By the 3rd section, a husband interested or claiming to be interested in right of his wife in any such question as aforesaid may concur in such case in his own name and in the name of his wife where the wife has no claim to any interest distinct from her husband, and that a married woman having or claiming any interest in

any such question as aforesaid distinct from her husband may in her own right concur in such case, provided that her husband also concurs therein.

Infant.—By the 4th section, the guardian of any infant interested or claiming to be interested in any such question as aforesaid may concur in such case in the name and on the behalf of the infant, unless such guardian has an interest in such question adverse to the interest of the infant therein.

Special Guardian, how appointed.—The 5th section provides, that it shall be lawful for the said court, by order to be made in the matter of any lunatic not found such by inquisition, or, in the matter of any infant, upon the application of any person on the behalf of such lunatic, or upon the application of such infant, by motion or petition, to appoint any person shown by affidavit to be a fit person, and to have no interest adverse to the interest of the lunatic or infant, to be the special guardian of such lunatic or infant for the purpose of concurring in such case, in the name and on behalf of the lunatic or infant, and any such person so appointed may lawfully so concur; provided always, that it shall be lawful for the said court to require notice of such application to be given to such person, if any, as the court shall think fit.

This order will be made ex parte on an affidavit showing that the proposed guardian has no interest in the matter and is a proper person to be appointed. The application should be by motion and not by petition. (*Re Goodfellow*, 1 Eq. Rep. 191; 21 L. T. 180.)

In an application by an infant for a guardian, a next friend is not necessary. (*Re Craig*, 20 L. J. 136; 16 L. T. 481.)

When a special case to which infants are parties states that A. B., who is also a party to the case, is their father and natural guardian, it is not necessary for a special guardian to be appointed by the court, although on applica-

tion to set down the case for hearing, it must be shown by affidavit that the father has no interest adverse to that of the infant's. (*Ellis* v. *Guitton*, 18 L. T. 269.)

The 6th section enacts, that in any case in which any such order as aforesaid shall have been made by the said court in the matter of any infant without notice to the guardian of the infant, it shall be lawful for the said court, if it shall think fit so to do, to discharge such order, upon the application of such guardian, by motion or petition; and the said court, if it shall think fit, may thereupon appoint some other fit person to be the special guardian of such infant for the purpose of such special case, and may also give such directions as may be necessary for substituting in such special case either the name of the guardian so applying, or of the special guardian so appointed in lieu of the name of the special guardian so displaced; provided always, that the discharge of any order appointing a special guardian shall not invalidate anything which shall in the meantime have been done by such special guardian, unless the court shall, upon notice to all parties, specially so direct.

How Special Case prepared.

The special case is drawn by counsel, principally, of course, from the instrument to be construed, if it be a question of construction, or otherwise from the facts laid before him. It must also be signed by counsel, as afterwards shown.

Its Form and Contents.

How entitled.—The 7th section requires that every such special case shall be entitled as a cause between some or one of the parties interested or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant; and that in the title to such cases lunatics and infants shall be described as such, and their committees, guardians or special guardians named; and that where in any such case a married woman is named as a plaintiff and

her husband as a defendant thereto, a next friend of such married woman shall be named in the title to such case.

Its Contents.—The 8th section requires that it shall concisely state such facts and documents as may be necessary to enable the court to decide the question raised thereby; and that upon the hearing of such case the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case any inference which the court might have drawn therefrom if proved in a cause.

By the 9th section it is provided, that every such special case to which an infant or lunatic is a party by his guardian or special guardian shall also state how such guardian or special guardian was constituted; and that where any married woman having or claiming any interest distinct from her husband is a party to such case, it shall be stated therein that she concurs in such case in her own right.

Counsel's Signature.—The 10th section requires that every such special case shall be signed by counsel for all parties. Where counsel had signed for the plaintiff and three of the defendants, it was held a sufficient compliance with this section. (*Re Craig*, 20 L. J. 136; 16 L. T. 481.) It is sufficient if the draft is signed by counsel without his signing the engrossment, his signature being copied on the latter. (*Stapleton* v. *Stapleton*, 17 L. T. 15.)

How engrossed and filed.

When drawn the special case is to be engrossed on parchment, bearing a Chancery stamp of 20*s.*; and at or near the top must be written, if to be heard by one of the Vice-Chancellors, the words "Lord Chancellor," and underneath them the words "Vice-Chancellor ——," naming him. If to be heard by the Master of the Rolls, the words "Master

of the Rolls" only should be written. It must also be indorsed with the name and address of the plaintiff's solicitor or firm, concluding with the words "plaintiff's solicitor" or "plaintiff's solicitors," and is then to be taken to the proper division, according to the first letter of the plaintiff's name, at the Record and Writ Clerks' Office, where it will be filed, and an office copy may then be bespoken by the party filing it.

The 10th section of the act provides, that every such special case shall be filed in the same manner as bills are filed; and that no defendant shall be required to take an office copy of a special case, but that an office copy thereof shall be taken by the plaintiff.

Appearance of Defendants.

By the 10th section it is provided, that the defendants to a special case may appear thereto in the same manner as defendants appear to bills.

This is done by handing in to the record and writ clerk a printed form of appearance, to be purchased of the stamp distributor in the same office, impressed with a Chancery stamp of 7*s.* or 14*s.*, or as the case may be, and filled up as the form denotes. The fee stamp will vary according to the number of defendants appearing together, as follows: if not more than three defendants, 7*s.*; if more than three, and not exceeding six, 14*s.*; and in the same proportion for every number of defendants.

When a case has been amended, fresh appearances must be entered for all the parties. (*Thistlethwaite* v. *Garnier*, 16 Jur. 57; 5 De G. & S. 73; 21 L. J. 16.)

Effect of Special Case filed, and Appearance entered.

What Parties bound.—The 11th section declares, that after a special case shall have been filed, and the defendants shall have appeared thereto, all the parties to such special

case shall be subject to the jurisdiction of the court in the same manner as if the plaintiff in the special case had filed a bill against the parties named as defendants thereto, and such defendants had appeared to such bill; and upon the special case being filed, and appearances entered thereto as aforesaid, all parties to such special case, other than married women, infants and lunatics, shall, for the purposes of such special case, be bound by the statements therein.

A Lis Pendens.—At this stage of the proceedings they are deemed to be a lis pendens, the 17th section enacting that the filing of a special case, and the entering of appearances thereto by the persons named as defendants therein, shall be taken to be a lis pendens, and may be registered under the provisions of an act made and passed in the second year of the reign of her present majesty, intituled An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens and Fiats in Bankruptcy, in like manner as any other lis pendens in a court of equity may now be so registered, and, unless and until so registered, shall not bind a purchaser or mortgagee without express notice thereof.

Production and Identification of Documents.

The 18th section provides, that any documents referred to in a special case, and any copies thereof or extracts therefrom, identified by the signature of the solicitors for all parties or of the London agents of such solicitors, may be produced and read at the hearing of such case, without further proof; and empowers the court at any time after the filing of the special case, and the entering of appearances thereto by the persons named as defendants therein, to order any document which may be admitted thereby to be in the possession of any party to such case to be deposited and produced in such manner and for such purposes as the court shall think fit.

This order may be obtained on application by summons

at chambers in the usual way, as in the case of an application for production of documents in a suit by bill.

How set down for Hearing.

The next step is to set down the special case for argument, the 12th section providing that so soon as all the defendants shall have appeared to the special case, the same may, subject to the provisions thereinafter contained, be set down for hearing, and subpœnas to hear judgment issued and served according to the practice of the said court.

When all Parties are sui juris.—The setting down is effected, where all parties are sui juris, by obtaining from the record and writ clerk his certificate of the case being filed, the form of which, bearing a 4*s.* Chancery stamp, is to be obtained of the stamp distributor in the office, and is filled up by the record and writ clerk. When signed by him, the party setting down the case is to endorse upon the certificate the name or firm of the solicitor or solicitors, and the date when it is set down, as follows:—

"A. B." *or* "A. and B." "Plaintiff's Solicitor" *or* "Solicitors."
20th day of February, 1854.

and the registrar's clerk, at the order of course seat, will then set down the special case in the registrar's book.

When any of the Parties are incapacitated.—In this case there must be an order of the court to set down the case, the 13th section requiring that when any married woman, infant or lunatic is party to a special case, application may be made to the court by motion for leave to set down the same, of which motion notice shall be given to every party to such case in whom, as executor, administrator or trustee, any property in question therein is or is alleged to be vested in trust for or for the benefit of such married woman, infant or lunatic, and also, if such application be not made by or on behalf of such married woman, infant or lunatic, to such married woman and her husband, or to such infant, or to such lunatic and his committee, if any, as the case may be;

and that upon the hearing of such motion the said court may give leave to set down such case, if it shall be of opinion that it is proper that the question raised therein shall be determined thereon, and shall be satisfied by affidavit or other sufficient evidence that the statements contained therein, so far as the same affect the interest of such married woman, infant or lunatic, are true, but otherwise may refuse such application: provided always, that in case the said court, upon the hearing of such application, shall be of opinion that it is proper that the question raised in such case shall be determined thereon, but shall not be satisfied that the statements contained therein, so far as they affect the interest of such married woman, infant or lunatic, are true, it shall be lawful for the said court to refer it to one of the masters thereof to make such inquiries as to the court shall seem proper, and upon further application being made, by motion as aforesaid, upon the said master's report, to give or refuse leave to set down such case as to the said court shall seem fit.

Instead of referring to the master, the court may now have the inquiries made in chambers.

When infants appearing by their father and natural guardian are parties to a special case, and he is also a party to the case in another character, it must be shown by affidavit, on the application to set down the case for hearing, that he has no interest adverse to that of the infants. (*Ellis* v. *Guitton*, 18 L. T. 269.)

The words "affect the interest of," in the 13th section, have been construed as meaning "prejudicially affect," &c., and statements calculated to affect those interests must be proved before the court will give leave to set down the case for hearing.

When the defendant is a feme covert, the leave of the court must be obtained to set down a special case. (———. 20 L. T. 275.)

Again, when any of the parties are married women, infants or lunatics, application to set down should be made to the court. (*Sidebotham* v. *Watson*, 21 L. T. 124.)

When the order is obtained, take it to the registrar's clerk at the order of course seat, together with the judge's book, and he will then set down the case for hearing.

New Circumstances after Special Case is set down.

Upon the birth of a tenant in tail after a special case had been set down for hearing, the proper course was held to be to move on affidavit that the order setting it down may be discharged for leave to amend, and that the amended case may occupy the place in the paper of the original case, and fresh appearances must be entered for all the parties. (*Thistlethwayte* v. *Garnier*, 16 Jur. 57; 5 De G. & S. 73; 21 L. J. 16.)

Effect of Special Case filed, and order to set down made.

Incapacitated parties are excepted from the enactment contained in the 11th section, that a special case filed and appearances entered shall bind the parties to the statements contained in the case, but it is provided by that section that married women, infants, and lunatics made parties to a special case shall, for the purposes of such special case, be bound by the statements therein, when, and not before, leave shall have been given by the court to set down such special case in manner thereinafter provided.

Subpœnas to hear Judgment.

When to be issued and served.]—The 12th section provides that so soon as all the defendants shall have appeared to the special case the same may, subject to the provisions thereinafter contained, be set down for hearing, and subpœnas to hear judgment issued and served according to the practice of the said court.

How issued.]—Subpœnas to hear judgment are prepared by the plaintiff's solicitor on forms usually printed on parchment, and readily obtained from a law stationer. Each subpœna must bear a 5*s.* Chancery stamp, and may be filled up with the names of three defendants, according to the Form No. 4, given at the end of the General Orders of the 8th May, 1845, substituting "special case" for the word "cause." The name or firm and address of the plaintiff's solicitor or solicitors must be endorsed. A præcipe, containing the short particulars of the writ (get the printed form at the Record and Writ Office), being handed with the writ to the record and writ clerk, it will be then sealed and ready for service.

How served.]—The subpœnas are served by delivering true copies, including the indorsement, on the solicitor or solicitors appearing for the defendants, or on a clerk or servant at his or their place of business, as shown by the appearance paper filed with the record and writ clerk.

Affidavit of Service.]—The plaintiff's solicitor should be prepared at the hearing with an affidavit of service of the subpœnas to hear judgment, in case of any defendant not appearing on the case; which affidavit will be in the same form as that given, ante, p. 130.

The Briefs for the Hearing.

The briefs for the hearing, as well of the plaintiff as of the defendants, will consist of a copy of the special case, and any documents referred to therein, upon which the court has to form an opinion, unless such documents are fully set out in the case, when separate copies will be unnecessary. There may also be such pertinent observations on the subject to be dealt with as may assist counsel in preparing for the argument. The fees will, as in other cases, be proportioned to the labour and time to be expended, and perhaps, in most cases, a consultation between the counsel may be necessary.

Papers for the Court.

Two or three days before the hearing of the case, the plaintiff's solicitor should deliver to the trainbearer a copy of the special case, and copies of such documents therein referred to as are not fully set forth, and upon which the judgment of the court is to be exercised. These may be handed to him in court, or at the room adjoining.

The Hearing.

The hearing of a special case comes on exactly like that of a cause, both being placed in the same list, and the special case being treated as a cause. It must, therefore, be watched accordingly.

What Documents, &c., may be read.]—The 18th section provides, that any documents referred to in a special case, and any copies thereof or extracts therefrom, identified by the signature of the solicitors for all parties, or of the London agents of such solicitors, may be produced and read at the hearing of such case, without further proof.

Power of Court.]—The court has power, under the 14th section of the act, upon the hearing of any such special case as aforesaid, to determine the questions raised therein or any of them, and by decree to declare its opinion thereon, and, so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and every such declaration of the said court contained in any such decree shall have the same force and effect as such declaration would have had, and shall be binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill.

The court cannot upon a special case go on to make a decree for specific performance (*Evans* v. *Evans*, 22 L. T. 43); and has no jurisdiction to make binding declarations of future

rights. (*Garlick* v. *Lawson*, 10 Hare, App., 14; *Greenwood* v. *Sutherland*, ibid. 12; *Burt* v. *Sturt*, 1 Weekly Rep. 145.)

Where a material fact had been omitted from a special case, which, however, appeared to have been recognized by all parties, a preface was introduced before the order stating the circumstances, from which it appeared that the fact had been so recognised. (*Lane* v. *Debenham*, 17 Jur. 1005.)

Case to Common Law Court.]—There is also a proviso in this section to enable the court, if it shall see fit so to do, before proceeding to make such decree as aforesaid, to send any case or cases for the opinion of any of her Majesty's courts of common law, reserving the consideration of all further directions and of the costs, and to make such decree as aforesaid upon such further directions, but this power to send cases for the opinions of courts of law is now abolished by the 15 & 16 Vict. c. 86, s. 61.

Court may refuse to decide.]—There is also a proviso that if upon the hearing of such special case as aforesaid the court shall be of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case, the said court may refuse to decide the same. And it refused to make a declaratory decree on special case during the life-time of the tenant for life, with regard to the interests of parties entitled in reversion. (*Garlick* v. *Lawson*, 10 Hare, App., 14.)

How far Declaration of Court protects Trustees acting under it.

The 15th section provides, that every executor, administrator, trustee, or other person making any payment or doing any act in conformity with the declaration contained in any decree made upon a special case, shall in all respects be as fully and effectually protected and indemnified by such declaration as if such payment had been made or act done

under or in pursuance of the express order of the said court made in a suit between the same parties instituted by bill, save only as to any rights or claims of any person in respect of matters not determined by such declaration.

Appeal, Rehearing and Review.

By the 33rd section all decrees and orders made under the provisions of the act under consideration are subject to rehearing, appeal, and review, and may be discharged and varied, in the same and the like manner as decrees and orders of the court made in suits instituted by bill.

Staying Proceedings till after Appeal.

Where any person shall be desirous to have a special case reheard, or to appeal from the decision thereon, the court may, under the 16th section, upon application for that purpose, either at the time of the decree upon such special case being made or at any time afterwards, and upon such conditions, if any, as the court shall think fit, order that the declaration contained in such decree shall not be acted upon for such time as the said court shall think just.

Costs.

Power is given by the 30th, 31st and 32nd sections to make general rules and orders as to costs, but none such having been made, and therefore the general rules and practice of the court governing the practice in these cases, the costs remain in the discretion of the court, subject to that practice, under the 32nd section, which enacts that, subject to such general rules and orders, the costs of all proceedings under the act shall be in the discretion of the court.

The court asserted its power to give directions as to costs in *Jackson* v. *Craig* (20 L. J. 204).

So in *Evans* v. *Evans* (22 L. T. 43), it was held that the act authorizes the court to deal with the costs of any special

case brought before it, but not to go on to make a decree for specific performance.

As to Rules and Orders for general Purposes.

The 30th, 31st and 32nd sections provide also for the making, rescinding and altering general rules and orders in reference to special cases, and as to amendment, revivor and supplemental matter or relief, and as to costs, and generally in relation to any proceedings under the act; but such rules and orders are to be laid before both houses of parliament, and to be subject to rejection or repeal; and until such rules and orders are made, and if not applicable when made, the practice is to be regulated by the provisions of the statute so far as the same extend, and, in so far as the same do not extend, by the rules, orders and practice of the court, in suits instituted by bill, so far as applicable.

No such general rules and orders have yet been made which are now operative as affecting the proceedings by special case, except the General Orders of the 25th October, 1852, which regulate the fees to be taken by the officers of the court.

Interpretation of Terms in Act.

The following is the interpretation clause in the act, being the 34th section thereof, and being the only part of the act now remaining to be noticed in reference to special cases:—

That the following words and expressions in this act shall have the several meanings hereby assigned to them, unless there be something either in the subject or in the context repugnant to such construction:—

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number.

Words importing the masculine gender only shall include females.

The expression "Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper and Lords Commissioners of the Great Seal of the United Kingdom for the time being.

The word "Master" shall mean Master in Ordinary of the High Court of Chancery in England.

The word "lunatic" shall include idiots and persons of unsound mind, and whether found such by inquisition or not.

The word "guardian" shall mean father or testamentary guardian, or guardian appointed by the Court of Chancery (not being a special guardian appointed under the provisions of this act).

EXECUTORS' AND ADMINISTRATORS' INDEMNITY.

The means provided for enabling executors or administrators of deceased persons to ascertain whether there are any outstanding debts or liabilities affecting the personal estates of such persons, without the delay and expense of suits to administer such estates, are embodied in the act 13 & 14 Vict. c. 35, known as Sir George Turner's Act, which, in accordance with the 35th section, commenced and took effect from and after the 1st day of November, 1850.

Order of Reference.

Under the 19th section of that act, the court was empowered, upon the application of the executors or administrators of any deceased person, by order to be made upon motion or petition of course, and to be in the form or to the effect set forth in the schedule thereto, with such variations as circumstances may require, to refer it to one of the masters of the said court to take an account of the debts and liabilities affecting the personal estate of such deceased person, and to report thereon; provided always, that no such

order should be made until the expiration of one year next after the death of such deceased person, or pending any proceedings to administer the estate of such person, and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person should be made, it should be lawful for the said court by such decree or order to stay or suspend the proceedings under such order of course, on such terms and conditions, if any, as to the said court should seem just.

The order now is for an account at the chambers of the judge instead of to the master, and the form of the order is altered accordingly.

The following is the form given in the schedule to the act:—

Form of Order of Reference to the Master.

[*Date.*]

In the matter of A. B., late of ——, in the county of ——, banker, [*or as the case may be,*] deceased.

Upon motion this day made unto this court by Mr. ——, of counsel for C. D. of ——, the executor [*or* administrator] of the above-named A. B. [*or* upon the humble petition of C. D. of ——, the executor [*or* administrator] of the said A. B.,] this day preferred unto the Right Honourable the Master of the Rolls for the reasons therein contained, it is ordered, that it be referred to the master of this court in rotation to take an account of the debts and liabilities affecting the personal estate of the said A. B., and to compute interest on such of the said debts and liabilities as carry interest after the rate of interest the same respectively carry; and the said master is to cause an advertisement to be published in the London Gazette and such other public papers as he shall think fit for the persons claiming in respect of any such debts or liabilities to come in before the said master, and prove their debts and claims, and he is to fix a peremptory day for that purpose; and such of the said creditors as shall not come in and prove their debts and claims by the time so to be limited are to be excluded the benefit of this order: and it is ordered, that the said master do distinguish debts from liabilities, and liabilities certain from liabilities contingent: and it is ordered, that the personal estate of the said A. B. be applied in payment and satisfaction of such debts and liabilities of the said A. B. in a due course of administration; and for the better taking the

said accounts and discovery of the matters aforesaid the parties are to produce before the said master, upon oath, all deeds, books, papers and writings in their custody or power relating thereto, and are to be examined upon interrogatories as the said master shall direct; and any of the parties are to be at liberty to apply to the court as there shall be occasion.

The act does not apply to real estate. (*Re Moore*, 22 L. T. 211.)

The words "motion or petition of course" in the 19th section mean that no service is requisite, but the motion or petition must be mentioned to the court, who will judge of the sufficiency of the affidavits. (*Re Harrold*, 20 L. J. 168; 16 L. T. 503.)

Every petition or motion paper for a reference under the 19th section of the said act is to be marked at or near the top or upper part thereof in the same manner as a bill is now marked with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls; and every order for any such reference is to be marked in the same manner as the said petition or motion paper, and the matter in which such order is made is thenceforth to be considered as attached to the court of the judge whose name shall be so marked upon such order, in like manner and for the like purpose as causes are attached to such court, but shall be subject to be transferred from such court in the same manner as causes are so transferred; and the provisions of the order comprised in the General Order of the 5th of May, 1837, which is numbered fifteen, and of the General Order of the 5th of August, 1842, shall apply to every matter so attached. (27th G. O., 2nd Nov. 1850.)

Report.

Within what Time, and how, objected to.—The 20th section enacts, that any person who may have come in before the master under any such order, and claimed to be a creditor upon the estate of the deceased person, or to have any demand upon such estate by reason of any liability, and

whose debt or claim may not have been wholly allowed by the said master, may apply to the court by motion, of which notice shall be given within fourteen days after the filing of the master's report, to have such claim allowed by the court, either wholly or partially; and that the said executors or administrators, and any creditor of the deceased person who may be authorized by special leave of the said court so to do, may apply to the said court by motion, of which notice shall be given within the time aforesaid, to have any debt or claim allowed by the said master disallowed by the court, either wholly or partially.

When it becomes absolute.—The same section declares, that at the expiration of fourteen days after the filing of the said report the same shall, except as to any debt or claim as to which any such notice as aforesaid may have been given, be absolute, as if the same had been confirmed by order of the court.

Hearing of Objections.—In order to provide for the hearing, counsel must be furnished with the notice of motion and such part of the report as affects the point to be decided, and the evidence upon which the decision was come to.

The 21st section provides, that upon the hearing of any such motion as aforesaid the said court may either dismiss such motion, or may order the debt or claim to which such motion relates to be allowed or disallowed, as the case may be, and either wholly or partially, or may direct further inquiry or further proceedings, by way of action or otherwise, touching such debt or claim, and after such inquiry or proceedings may, upon further motion, deal with such debt or claim as to the said court shall seem just; provided always, that no new evidence shall be received by the said court upon the hearing of any such motion without special leave of the said court.

As to providing for Satisfaction of Debts and certain Liabilities, or directing further Accounts.

The 22nd section provides, that in case any debt or any certain liability shall have been allowed as aforesaid, and shall not within fourteen days after the report has become absolute as to such debt or liability, or after the same shall have been allowed by the said court, be paid or provided for by appropriation to the satisfaction of the person who has established such liability, it shall be lawful for the said court, by order, to be made, in case of any debt remaining due, upon the application by motion or petition of the person to whom the debt remains due, and on notice to the executors or administrators, and in case of any certain liability remaining unprovided for by appropriation, upon the application by motion or petition of the person by whom such liability has been established, or of the executors or administrators, and on notice by the party applying to the other of them, to order payment of the debts which may have been allowed and remain unpaid, and to provide for the certain liabilities which may have been allowed and remain unprovided for, in like manner as the same could or might have been paid or provided for in a suit for that purpose instituted by bill, or to refer it to the master to take an account of the debts and certain liabilities allowed as aforesaid which remain unpaid or unprovided for, and also the usual accounts of the personal estate of the deceased person, with all usual and proper directions; and every such order shall have the same force and effect and shall be prosecuted and carried on in like manner as a decree in a creditor's suit instituted by bill.

The court refused to order the application of proceeds of real estate, the act not applying to real estate. (*Re Moore*, 22 L. T. 211.)

As to Appropriation of Money to answer contingent Liability.

By virtue of the 23rd section, in case any contingent liability shall be allowed by the report or by the court, it shall be lawful for the court, by order, to be made upon the application of the executors or administrators, by motion or petition, on notice to the person who may have established such contingent liability, to order such sum of money, part of the estate of the deceased person, as to the court shall seem just, to be set apart and appropriated for answering such contingent liability, and to give such directions as the court shall think fit touching the payment of such sum of money into court, and the investment thereof, and the payment, application or accumulation of the interest or dividends thereof in the meantime and until the same shall be required to answer such liability, and when such liability shall be ascertained or determined to give such directions as to the payment of such sum out of court as the court shall deem right; provided always, that no order to be made as aforesaid shall in any manner bind the assets so appropriated as against the persons entitled to the estate of the deceased subject to the contingent liability; and any person interested in such appropriated assets may apply to the court touching the same as he may be advised.

Injunction to restrain Proceedings at Law by Claimants.

When and how granted.—The 24th section provides, that after the filing of the report it shall be lawful for the court, upon the application of the executors or administrators of the deceased, by order, to be made on motion, to restrain by injunction any proceedings at law against them by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability, other than

the persons who may have established contingent liabilities under the said order for which no appropriation may have been made.

Executors and Administrators indemnified.

When and against whom.—The 25th section enacts, that in case no debt or liability, or no debt or liability other than a contingent liability, shall have been allowed as aforesaid, or in case any debt or liability other than as aforesaid shall have been allowed as aforesaid, then after the same shall have been paid or provided for by appropriation as aforesaid, all payments made by the executors or administrators, or any of them, on account of the estate of the deceased person, and all dispositions of such assets made by them or any of them on account of such estate, shall, as against all persons having or claiming to have any demand upon such estate by reason of any debt or liability, other than persons who may have established under the said order any contingent liability for which no such appropriation as aforesaid may have been made, be as good and effectual as if the same had been made under a decree of the court: provided always, that nothing herein contained shall in any manner affect or prejudice the rights of any creditor or other person having any demand or claim upon the estate of the deceased against any assets so paid or disposed of, or against the persons to whom such payment or disposition may have been made, or against any assets appropriated under the provisions of this act, and the appropriation of which, if made under a decree of the court in a suit to which he was not a party, would not have been binding upon him.

Appeal, Rehearing and Review.

By virtue of the 33rd section, all decrees and orders made under the provisions of the act now under consideration are subject to rehearing, appeal and review, and may be discharged and varied in the same and the like manner as

decrees and orders of the court made in suits instituted by bill.

Costs.

Under the 30th, 31st and 32nd sections, the Lord Chancellor, with the advice and consent of the Master of the Rolls and one or more of the Vice-Chancellors, may make general rules and orders as to costs of any proceedings under or in pursuance of the act. No such rules or orders have yet been made, and therefore the general rules and practice of the court govern the practice as to costs in the cases now under consideration; and, subject to that practice, the costs remain expressly in the discretion of the court, in conformity with the 32nd section.

As to Rules and Orders for general Purposes of Act.

The 30th, 31st and 32nd sections provide also for the making, rescinding and altering general rules and orders for effectuating the purposes of the act as to the debts and liabilities of deceased persons, and as to amendment, revivor and supplemental matter or relief, and as to costs, and generally in relation to any proceedings under the act; but such rules and orders are to be laid before both houses of parliament, and to be subject to rejection or repeal; and until such rules and orders are made, and if not applicable when made, the practice is to be regulated by the provisions of the act, so far as the same extend, and, in so far as the same do not extend, by the rules, orders and practice of the court in suits instituted by bill, so far as applicable.

No such general rules and orders have yet been made which are now operative as affecting the practice under these proceedings, which are governed by the general practice of the court.

Interpretation of Terms in Act.

The following is the interpretation clause in the act, being the 34th section thereof, and this is the only remaining por-

tion of the act to be noticed in reference to the present subject:—

That the following words and expressions in this act shall have the several meanings hereby assigned to them, unless there be something either in the subject or in the context repugnant to such construction:—

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number;

Words importing the masculine gender only shall include females;

The expression "Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper and Lords Commissioners of the Great Seal of the United Kingdom for the time being;

The word "Master" shall mean Master in Ordinary of the High Court of Chancery in England;

The word "lunatic" shall include idiots and persons of unsound mind, and whether found such by inquisition or not;

The word "guardian" shall mean father or testamentary guardian, or guardian appointed by the Court of Chancery (not being a special guardian appointed under the provisions of this act).

ISSUE AT LAW.

Where a legal right is not clear and beyond all reasonable doubt, and there is a question as to amount of damage, this court will not decide the question at law, but give leave to bring an action. (*Vigurs* v. *Vigurs*, 16 Jur. 1009.) So also may the aid of a court of law be required in other cases, if the verdict of a jury is thought necessary. The court will however avoid this expense and delay, when it can do so with propriety.

An issue at law to try a question of heirship may be directed on interlocutory motion as well as on the hearing

(*Lancashire* v. *Lancashire*, 9 Beav. 259); and the costs of an issue so directed may, after verdict, be disposed of also on interlocutory application. (*Duncan* v. *Varty*, 2 Phil. 696.) But the court refused a motion for an issue *devisavit vel non* before any evidence was gone into. (*Roberts* v. *Kerslake*, 2 Eq. Rep. 671; 23 L. J. 632.)

The practice is now regulated by the 8 & 9 Vict. c. 109, s. 19, which supersedes the old practice of feigned issues. That section recites, that many important questions were then tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and the negative of certain propositions; but that such questions might be as satisfactorily tried without such form; and enacts, that in every case where any court of law or equity may desire to have any question of fact decided by a jury it shall be lawful for such court to direct a writ of summons to be sued out, by such person or persons as such court shall think ought to be plaintiff or plaintiffs, against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed, with such alterations or additions as such court may think proper; and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue.

The order directs, if necessary, all parties to the issue to produce at the trial all necessary documents in their custody or power; and that any special matter shall be indorsed on the postea (*De Tastet* v. *Bordenave*, 1 Jac. 516; *White* v. *Lisle*, 3 Swanst. 345); and any other special directions.

When the order directing the issue is entered, a writ of summons is issued pursuant to the above act by the plaintiff's attorney, the draft of which may be settled by the common law counsel, and sometimes by both common law and equity counsel in consultation, and a copy is then sent to the defendant's attorney for his approval, prior to the writ being engrossed on parchment. It is sealed at the office of

the court where the issue is to be tried, and then served on the defendant, or an undertaking obtained from his solicitor to appear thereto. After appearance, notice of trial is given at the time of delivering the issue, which consists only of a copy of the writ and the award of the venire. The record is then made up, and the cause set down as in other cases.

Notwithstanding the trial of an issue, a party to that trial may appeal against the order directing it. (*Butlin* v. *Masters*, 2 Phil. 290; *Parker* v. *Morrell*, 2 Phil. 453; 12 Jur. 253.)

Any application for a special jury must be made to this court. (*Anon.*, 2 P. Wms. 67; *Butlin* v. *Allibone*, 13 L. J. 216.) So must any application to postpone the trial, if the time has been fixed by this court. (*Kebel* v. *Philpot*, 9 Sim. 614.)

An issue may be taken pro confesso against a party failing to proceed to trial, upon motion to this court that he may proceed to trial at the next sittings, or that in default, the issue may be taken pro confesso (—— v. ——, 4 Madd. 255: see also *Hartland* v. *Dancox*, 5 De G. & S. 561; 21 L. J. 449), unless a satisfactory reason can be assigned for the delay (*Hargrave* v. *Hargrave*, 8 Beav. 289; *Varty* v. *Duncan*, 11 Jur. 809); or the court may impose terms not only as regards costs, but also the examination de bene esse of an aged witness. (*Reeves* v. *Hodson*, 10 Hare, App., 24; 17 Jur. 344.)

The 47th General Order, 1828, provides, that every application for the new trial of an issue at law, directed by a judge of this court, must be first made to the judge who directed such issue.

By the case of *Hargrave* v. *Hargrave* (10 Jur. 957), the following points of practice are decided, viz., that upon a new trial, the admissions used on the former trial will be directed to be used, unless it appears to the court that it would be unreasonable to bind the parties to them; that the evidence taken at a former trial of witnesses, since dead or unable to attend, will be ordered to be read from the judge's

notes; and that if the parties agree, the court will allow copies of the common law judge's notes to be made for the parties.

After the verdict is recorded, the cause must be brought on for further directions on the equity reserved, for which purpose it is set down in the registrar's book for hearing, in a similar manner to that in which a cause is set down for further directions, viz. on petition, stating the order directing the trial, and the result of that trial. The subsequent proceedings correspond with those had after a reference to the master. The proper papers, viz., copies of the decree or order and record, as completed, should be left for the judge before the hearing.

An heir at law who disputed a will on the ground of insanity was, on failing, allowed the costs of the issue at law, it not appearing that he had improperly or dishonestly raised the issue. (*Waters* v. *Waters*, 23 L. T. 242.)

PAUPERS.

This court allows persons who can make affidavit that they are not worth 5*l.*, their wearing apparel and the subject matter of the suit or proceeding excepted, to sue or defend *in formâ pauperis*. The order may generally be obtained as of course upon petition at the Rolls, but sometimes a special application to the court is necessary; as where the plaintiff claimed as representative of other parties, under an instrument of doubtful construction, an order of course obtained by him to sue *in formâ pauperis* was held to be irregular, and a special application was considered necessary (*St. Victor* v. *Devereux*, 6 Beav. 584; 13 L. J. 102; 8 Jur. 26); and in the case of a married woman the application must generally be special. (*Coulsting* v. *Coulsting*, 8 Beav. 463; 14 L. J. 385; 9 Jur. 587.) So whenever there are special circumstances, the application, it would seem, should be special, and should be made to the judge to whose court the cause or matter is attached.

In the case of a married woman living apart from her husband, the Lord Chancellor and Lords Justices allowed her, upon an ex parte application, to sue *in formâ pauperis* without a next friend. (*Re Lancaster*, 18 Jur. 229; 23 L. T. 4.)

And where a married woman was not living apart from her husband, but was prevented by him from having access to her infant under seven years of age, she was permitted to petition, under the 2 & 3 Vict. c. 54, *in formâ pauperis*, and without a next friend, and without payment of the 20*s.* stamp; and in the same case it was held not to be an improper suppression to forbear disclosing that she had relations in good circumstances; it not appearing that any of them would become her next friend. (*Ex parte Hakewill*, 3 De G., M. & G. 116; 17 Jur. 334; 22 L. J. 662.)

But an order obtained ex parte for a married woman to sue *in formâ pauperis* in respect of her separate estate, without a next friend, was discharged. (*Re Page*, 10 Hare, App., 52; 17 Jur. 336.) Yet in the case of *Wellesley* v. *Mornington* (2 Eq. Rep. 675), the V. C. Kindersley decided that when the bill is settled and signed by counsel, the court will, without further information, allow it to be filed *in formâ pauperis* for a married woman without a next friend.

Where the subject of the suit is the reversionary interest of the wife, it is an order of course for the husband and wife to sue *in formâ pauperis*. (*Pitt* v. *Pitt*, 17 Jur. 571.)

A party may appeal *in formâ pauperis* (*Clarke* v. *Wyburn*, 17 L. J. 159; 12 Jur. 167), or take any other proceedings connected with a suit.

An executor cannot avail himself of the privilege as executor, though he has no assets. (*Oldfield* v. *Cobbett*, 1 Phil. 613; 3 Beav. 432; 10 Jur. 2; *Fowler* v. *Davies*, 16 Sim. 182; 17 L. J. 287; 12 Jur. 321.) Nor can a half-pay officer, who has taken the benefit of the Insolvent Debtors' Act. (*Boddington* v. *Woodley*, 5 Beav. 555; 12 L. J. 15.)

The meaning of the affidavit to be made is, that the party has not 5*l.* in the world besides his wearing apparel and the subject-matter of the suit or matter available for the prosecution or defence of the suit. (*Dresser* v. *Morton*, 2 Phil. 286.)

The order, when obtained, in effect exempts the party from payment of any fees or expenses throughout the suit or proceeding, and from the payment of costs in case of failure therein, and it assigns a counsel and solicitor to conduct it; and such counsel or solicitor may not refuse, unless he satisfies the court that he has some good reason for his forbearance. (Beam. Ord. 216.)

The 9th and 10th General Order, 1st June, 1854, regulate the charges to be made to persons suing *in formâ panperis* for copies of pleadings and other proceedings. See title "*Copies of Pleadings and other Proceedings, &c.*," infra.

The presentation of the petition of course is accompanied by the office copy of the affidavit of poverty, and in the case of a plaintiff there should be the certificate of counsel at the foot that he has good cause of suit, and thereupon the order is drawn up.

The order must be served without delay to entitle the party to the immediate benefit of it; but he will not be allowed to keep it back and produce it at the last moment, so as to obtain *dives* costs if he succeeds, or to obtain the benefit of it if he fails. (*Church* v. *Marsh*, 2 Hare, 652; 13 L. J. 12; 8 Jur. 54; see also *Smith* v. *Pawson*, 17 L. J. 454.)

All notices of motion and petitions on behalf of paupers must be signed by a solicitor. (16 G. O., Oct. 1842; *Perry* v. *Walker*, 4 Beav. 452; 2 Y. & C. 655; 8 Jur. 53.)

A pauper plaintiff, to whom counsel and solicitor are assigned, cannot appear in person to support a motion. (*Parkinson* v. *Hanbury*, 1 Eq. Rep. 368; 22 L. J. 979.)

The court will discharge the order if improperly or irregularly obtained. But not if there be a waiver by delaying the application, and allowing the pauper to take proceedings

in his suit. (*St. Victor* v. *Devereux*, 9 Jur. 519; *Parkinson* v. *Hanbury*, supra.) So also will it dispauper the party if he is guilty of vexatious conduct in the suit; (*Wagner* v. *Mears*, 3 Sim. 127; *Daintree* v. *Haynes*, 12 Jur. 594); or, if he contracts for or sells the benefit of the suit, the court will dismiss it (Beam. Ord. 216); and may commit the pauper for filing an improper bill. (*Pearson* v. *Belchier*, 4 Ves. 627.)

By the 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, r. 6, it is enacted, that if a defendant, upon being brought before the court upon an habeas corpus, shall make oath (which shall be administered to him by the registrar, and he shall be examined in open court), that he is unable by reason of poverty to employ a solicitor to put in his answer, the court shall thereupon refer it to a master in rotation to inquire into the truth of that allegation, and to report thereon to the court forthwith, and thereupon the court may make such order as upon other reports of the like nature under the provisions hereinafter contained.

By the 75th General Order, 8th May, 1845, it is provided, that upon a defendant being brought up in custody for want of his answer, and making oath in court that he is unable, by reason of poverty, to employ a solicitor to put in his answer, the court is thereupon to refer it to the master to inquire into the truth of that allegation, and to report thereon to the court forthwith; and the court may appoint a solicitor to conduct such inquiry on the behalf of such defendant; and if the master reports such defendant to be unable, by reason of poverty, to employ a solicitor to put in his answer, the court may assign a solicitor and counsel for such defendant to enable him to put in his answer.

By the 7th rule of the 15th section above referred to it is enacted, that on the thirtieth day of January, the thirtieth day of April, the thirtieth day of July, and the thirtieth day of October, in every year, or if any of those days happen on

a Sunday, then on the following day, one of the masters of the Court of Chancery, to be named by the court, shall visit the Fleet Prison, and examine the prisoners confined there for contempt, and shall report their opinion on their respective cases to the court; and thereupon it shall be lawful for the court to order, if it shall see fit, that the costs of the contempt of any such prisoner shall be paid out of the interest and dividends arising from the Suitors' Fund standing in the name of the accountant-general of the said Court of Chancery, or out of any cash standing to account (after and subject to the payment of all charges which by any act heretofore passed are directed to be paid thereout), and to assign a solicitor and counsel to such prisoner, for putting in his answer and defending him *in formâ pauperis*, and to direct any such prisoner, having previously done such acts as the court shall direct, to be discharged out of custody; provided that if any such defendant become entitled to any funds out of such cause, the same shall be applied, under the direction of the said court, in the first instance to the reimbursement of the Suitors' Fund.

By the General Order, 6th December, 1844, it is provided, that in every case in which application shall be intended to be made for the discharge of any prisoner in contempt, and for the payment out of the Suitors' Fund of the costs of such contempt, in pursuance of the above-mentioned act, notice in writing of such intended application shall be served upon the solicitor to the Suitors' Fund two clear days at the least before the day upon which the application is intended to be made.

In every case in which a reference to the master, under the said act, shall be directed to inquire into the fact of the poverty of any prisoner in contempt, notice, in writing, of the order of reference, and of every warrant to proceed thereupon before the master, shall be duly served upon the solicitor to the Suitors' Fund. (G. O., 6th Dec. 1844.)

If a pauper succeeds, the court has a discretion to give him either dives costs or pauper costs. (*Church* v. *Marsh*, 2 Hare, 655; 13 L. J. 12; 8 Jur. 54.) But upon a plea or demurrer overruled a pauper plaintiff is entitled to dives costs. (1 Eq. Ca. Ab. 125.) So also, where defendant's answer was reported impertinent (*Rattray* v. *George*, 16 Ves. 232); and by the General Order, 10th December, 1849, it is provided, that in all cases where costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such costs shall, unless the court shall otherwise order, be taxed as *dives* costs. A pauper suit dismissed for want of prosecution is dismissed with costs, and a second suit for the same matter will be stayed until such costs are paid.

When a defendant obtains an order to defend *in formâ pauperis* at the latter stage of a suit, the court will, if the merits so require, direct him to pay the costs up to the date of the order (*Prince Albert* v. *Strange*, 13 Jur. 507); and where the order is obtained after costs are ordered to be paid in the course of the suit, the pauper may be attached for non-payment of such costs, without being first dispaupered. (*Davenport* v. *Davenport*, 1 Phil. 124.)

A pauper plaintiff has no power after answer to dismiss the bill ex parte, without costs. (*Parkinson* v. *Hanbury*, 22 L. J. 979.)

MOTIONS.

A motion is an application to the court, the terms of which are sometimes expressed in writing, and sometimes orally, founded upon a case not reduced to writing, except so far as the evidence adduced in support of it may be considered a statement of the case, which, however, literally it is not. Every day in term is a motion day, though it is not the practice of the court to hear opposed motions, except on days specially appointed for that purpose. (*Chaffers* v. *Baker*, 23 L. T. 181.)

The 6th General Order, 11th November, 1841, requires that all notices of motion not in any cause, and all petitions not in any cause, which are presented to the Lord Chancellor, shall be marked with the title of one of the Vice-Chancellors, and shall thenceforth be attached to such Vice-Chancellor's Court unless removed therefrom by any special order of the Lord Chancellor.

The General Order of the 5th August, 1842, *after reciting that*, by the 15th of the Orders bearing date the 5th day of May, 1837, it is ordered, that in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any judge of the court, in the same manner as if the Orders of the said 5th day of May had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-Chancellor, shall, if not made by the judge to whom the application if made during the ordinary sittings of the court would have been made, pursuant to the directions contained in the Orders of the said 5th day of May, be marked as having been made for such judge, and shall, in the future proceedings of the cause, be deemed to be the order of such judge, in all respects, save this, that no order so made by one judge for another, under the circumstances aforesaid, shall be reheard, for the purpose of being discharged or varied, otherwise than by the Lord Chancellor: *and that*, by reason of the appointment of two additional judges of the High Court of Chancery, it has become necessary to extend the operation of the said recited order: and whereas, by the 5th of the Orders bearing date the 11th day of November, 1841, it is ordered, "that all motions, petitions, and further proceedings, in causes in the Lord Chancellor's Court, except any motions or proceedings which were then part heard, should be had before the judge to whose court the same

should, under the provisions of the said Orders of the 11th day of November, 1841, be attached, unless removed therefrom by any special order of the Lord Chancellor:" *provides that* the said 15th Order of the said 5th day of May shall extend to applications for special orders to be made, in the interval therein mentioned, to, and also to orders to be made in such interval by, any judge of the Court of Chancery, as such court is now constituted, and that, subject to the provisions of the said 15th Order of the 5th day of May, 1837, the said 5th Order of the 11th day of November, 1841, shall not extend to applications and orders to be made in such interval as aforesaid. (See also *Holloway* v. *Philipps*, 22 L. J. 1091.)

The 7th General Order, 29th October, 1851, requires that all motions, petitions, and further proceedings in causes and matters to which the Orders of that date refer, shall (subject to the provisions of the 15th of the General Orders of the 5th May, 1837), be heard before the judges to whose court the same are, under the provisions of these Orders, respectively attached, unless removed therefrom by any special order of the Lord Chancellor.

These Orders appear not to extend to motions of course. (*Magan* v. *Magan*, 16 Jur. 587.)

Motions, like petitions, are of two kinds, viz., *special*, and *of course*; the former consisting also of two species, viz., those which are required to be made on notice, and those which are not.

Motions *of course* need not be mentioned to the court, but a motion must always be mentioned to the court when the thing asked for is subject to the discretion of the judge, or when it is one upon which he has to form an opinion. Those which need not be mentioned to the court are frequently granted without any evidence, that is to say, on the mere allegation of the party applying. Of this nature are motions to revive suits on the deaths of parties, and motions for orders nisi to confirm reports of masters in ordinary.

There are also others of the same character. The allegations must be true, and every material fact must be stated, otherwise the order may be set aside.

Motions *of course* may be made on any day in or out of term, and whether a seal day or not. (*Lord Harborough* v. *Wartnaby*, 1 Phil. 364; 13 L. J. 279; 8 Jur. 326.) And if in a cause attached to a Vice-Chancellor's court they may be made before any one of the Vice-Chancellors. (*Magan* v. *Magan*, 16 Jur. 587.) It is only necessary in these cases to endorse a sheet of paper with the ordinary short title of the cause, and to write thereon the object of the motion, with the counsel's name, marking also as his fee 10*s.* 6*d.* Within the fold should be written the proper title or titles in short, showing the names of the leading plaintiffs and defendants, together with such facts and dates as the registrar requires to enable him to draw up the order. This motion paper, being first signed by counsel, is to be handed to the registrar in court, and by him marked and entered in his book. It may then be taken to the proper division of the order of course seat, in the Registrar's Office, where it will be drawn up on the necessary papers being left. It must afterwards be passed by the registrar, which may be done without notice (*Hart* v. *Tulk*, 18 L. J. 162), and entered.

Orders of course are entered, to save time, on leaving with the entering clerk a copy of the order, and at the same time he will sign the original as entered. They may be varied on an ex parte motion if the variation will not be less beneficial to all parties than the original order. (Ibid.)

The 13 & 14 Vict. c. 35, s. 29, provides, that so much of an act made and passed in the fifty-third year of the reign of his late majesty King George the Third, intituled "An Act to facilitate the Administration of Justice," as provides that the Vice-Chancellor appointed under that act shall have no power or authority to discharge, reverse, or alter any decree, order, act, matter or thing made or done by any

Lord Chancellor, Lord Keeper or Lords Commissioners for the Custody of the Great Seal, unless authorized by the Lord Chancellor, Lord Keeper or Lords Commissioners for the time being so to do, nor any power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by the Master of the Rolls, and so much of an act made and passed in the fifth year of the reign of her present Majesty, intituled "An Act to make further Provisions for the Administration of Justice," as provides that no Vice-Chancellor appointed under the authority of that act shall have power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by any other Vice-Chancellor to be appointed under that act, not being a predecessor in office of such Vice-Chancellor, nor any decree, order, act, matter or thing made or done by any Lord Chancellor, unless authorized by the Lord Chancellor so to do, nor any power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by the Master of the Rolls or the Vice-Chancellor for the time being appointed in pursuance of an act passed in the fifty-third year of the reign of his majesty King George the Third, intituled "An Act to facilitate the Administration of Justice," shall be and the same are respectively thereby repealed so far as the same respectively apply to orders on motion or petition of course made by the Lord Chancellor, Master of the Rolls, or any of the Vice-Chancellors; and that it shall be lawful for the Master of the Rolls and the Vice-Chancellors respectively to discharge, reverse or alter any order made on motion or petition of course by any other of them, or by the Lord Chancellor. And the 26th General Order of November, 1850, provides that applications to discharge, reverse or alter any order made on motion or petition of course by the Lord Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, are to be made to the judge to whom special applications in the cause or matter in which such order is made ought to be

made according to the practice of the court, and the General Rules and Orders applicable thereto.

Before a *special* motion can be brought on, except by consent or by leave of the court, or except in the case of an injunction or writ of ne exeat regno, or other urgent matter, or except where there is no one on whom service can be effected, the party moving must serve a notice of motion, stating the precise object in view, on all the parties to the suit sought to be affected by it, or representing interests likely to be affected. The notice required to be given is, unless the court gives special leave to the contrary, at least two clear days, not reckoning Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week. (16th G. O., May, 1845, art. 47.) This notice is often lessened on application to the court for that purpose in cases of urgency, and when special leave is given the notice of motion must state that fact. (*Hill* v. *Rimell*, 8 Sim. 632; *Harris* v. *Lewis*, 8 Jur. 1063.) Sometimes, however, a longer notice than two days is required, as in the case of an infant or person of weak or unsound mind, not so found by inquisition, where the plaintiff seeks to have one of the solicitors of the court assigned his or her guardian ad litem. (32nd G. O., 8th May, 1845.) The title of the cause should be correctly set forth (*Rowlatt* v. *Cattell*, 2 Hare, 186); and if the costs of the application are intended to be asked for, it should state so. (*Mann* v. *King*, 18 Ves. 296.) But the costs may be given when this is omitted. (*Clark* v. *Jaques*, 11 Beav. 623; *Butler* v. *Gardiner*, 12 Beav. 525; 19 L. J. 473; *Dawson* v. *Jay*, 23 L. T. 239.)

In the case of an information the notice must be on behalf of the attorney-general and not the relator. (*Attorney-General* v. *Wright*, 3 Beav. 447.)

A notice of motion by a pauper must be signed by his solicitor. (16 G. O., Oct. 1842; *Perry* v. *Walker*, 4 Beav. 452; 2 Y. & C. 655; 8 Jur. 53.)

Generally the service of a notice of motion at the office

of a party's solicitor in the cause, after appearance, is sufficient, but before appearance with the leave of the court, or afterwards in cases of contempt, the service must be on the party personally, or at his residence on one of his family or household; except, however, in the case following, viz.: that the plaintiff shall, without special leave of the court, be at liberty to serve any notice of motion, or other notice, or any petition, personally, or at the dwelling-house or office of any defendant, who having been duly served with subpœna to appear to and answer the bill, shall not have caused an appearance to be entered by his own clerk in court, at the time for that purpose limited by the general orders of the court. (3rd G. O., 11th April, 1842.) But this does not apply where the defendant has been served out of the jurisdiction, in which case leave of the court must be obtained. (*Green* v. *Pledger*, 3 Hare, 165; 13 L. J. 213; 8 Jur. 801.)

Where no address for service shall have been indorsed by the solicitor or party, as required by the 17th and 20th General Order, 26th October, 1842, service not required to be personal may be good service, unless ordered to the contrary, at the solicitor's place of business, or personally on the party if he has no solicitor; and if such address has been endorsed, the service there will be good service. (Orders 19 and 21.) This does not extend to matters of contempt.

Whenever a person who is not a party appears in any proceeding, either before the court or before the master, service upon the solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service. (44th G. O., April, 1828.)

Although the evidence used upon a motion is mostly that of affidavits and documents, either party is at liberty to adduce oral testimony by virtue of the recent changes in the practice. By the 40th section of the 15 & 16 Vict. c. 86, it is provided that any party in any cause or matter may by subpœna ad testificandum or duces tecum require the at-

tendance of any witness before an examiner of the court, or an examiner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any claim, motion, petition or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used on any claim, motion, petition or other proceeding before the court, shall be bound on being served with such writ to attend before an examiner for the purpose of being cross-examined; but the court shall always have a discretionary power of acting on such evidence as may be before it at the time, and of making such interim orders or otherwise as may appear necessary to meet the justice of the case. The court will not, however, stop the arguments to permit a party or witness to be examined, but application should be made before the motion is brought on. (*Smith* v. *Swansea Dock Company*, 9 Hare, App., 20; 16 Jur. 1130.) And by virtue of the same section any persons making affidavits to be used on any claim, motion, petition, or other proceeding before the court, not being the hearing of a cause, shall be bound, on being served with a subpœna ad test. or duces tecum, to attend before an examiner for the purpose of being cross-examined.

In order to read affidavits filed in the cause before the notice of motion was given, notice to that effect must be given. If the party giving such notice does not read them, the opposite party may do so. (*Cauty* v. *Houlditch*, 14 Sim. 75.)

As to what notice of examination and cross-examination is necessary in these cases to be given to the opposite parties, see ante, "*Proceedings for Plaintiff's by Bill.*"

Affidavits filed after a motion has been opened are not admissible, unless the court desires the information contained in them.

The brief on a motion consists of a copy of the notice of

motion, and of the evidence, whatever it may be, and copies of any documents referred to which it may be necessary for counsel to have, together with such observations as may be considered calculated to assist the matter to a successful result.

No refresher fees are payable to counsel on motions, though they stand over from one term to another.

Form of Affidavit of Service of Notice of Motion.

In Chancery.

Between A. B. . . . . Plaintiff;
and
C. D. and E. F. . . . . Defendants.

I, ——, of ——, make oath and say as follows:—

1. I did, on ——, the —— day of —— [before eight o'clock in the evening], serve Mr. ——, the solicitor or agent of the defendant C. D. in this cause, with a notice in writing, purporting that this honourable court would be moved before [*as in the notice of motion, down to the word* "Dated," *but putting it in the past tense*], by delivering such notice to and leaving it with a clerk [*or as the case may be*] of the said Mr. ——, at the office of the said Mr. ——, situate at ——.

2. I did, on the same —— day of —— [before eight o'clock in the evening], also serve Mr. ——, the solicitor or agent of the defendant E. F. in this cause, with a notice in writing, in the same words and figures and to the same purport and effect as the said first-mentioned notice, by delivering such secondly mentioned notice to and leaving it with a clerk [*or as the case may be*] of the said Mr. ——, at the office of the said Mr. ——, situate at ——.

Sworn, &c.

[*If the service is effected more than two clear days before the day of moving, the time of the day need not be stated.*]

An order taken upon an affidavit of service should be in strict accordance with the notice of motion, or it may be set aside. (*Hutton* v. *Hapworth*, 6 Hare, 315; 12 Jur. 835.) Where an order has been made on motion and affidavit of service, in the absence of parties, the court will, on proper application, give the absent parties leave to move to discharge the order. (*Mapp* v. *Elcock*, 22 L. J. 707.)

[For observations as to particular motions, see their respective titles.]

When the principal object of a motion fails, the party moving must pay costs. (*Sturch* v. *Young*, 5 Beav. 557.) And if the costs of a motion are reserved till the hearing of the cause, and at the hearing the costs of suit are reserved till further directions, no mention being made of the costs of the motion, the latter will not be dealt with at all upon further directions. (*Gardner* v. *Marshall*, 14 Sim. 575; 9 Jur. 958.)

When a motion of which notice has been given is not made it is treated as an abandoned motion, and upon being mentioned to the court an order may be drawn up for the costs. These costs are, where there is no affidavit filed by either party, 40*s.* only; if an affidavit is filed, the costs are taxed costs, unless the court fixes the amount upon production of the notice of motion. (G. O., 5th August, 1818.) The costs of an abandoned motion are to be applied for at the seal or motion day next after the day for which the notice of motion was given, if the party moving do not apply to save it until a future day. (*Woodcock* v. *Oxford, Worcester and Wolverhampton Railway Company*, 10 Hare, App., 54; 17 Jur. 33.) Counsel is at liberty on the first day for which a motion is fixed to save it for a future day. (*Re Banwen Iron Company*, 17 Jur. 127.)

A motion that has been opened cannot afterwards be treated by the party moving as an abandoned motion, and taxed costs will be given as if the motion were refused. (*Dugdale* v. *Johnson*, 5 Hare, 92.) But when the party intending to move merely gives notice of his intention to read an affidavit previously filed, the costs are only 40*s.* (*Green* v. *Meares*, 14 Sim. 526.)

The 123rd General Order of May, 1845, provides, that upon interlocutory applications, where the court deems it proper to award costs to either party, the court may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid.

The 124th of the same Orders provides, that in cases where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order ordered or decreed to be paid, the taxing master may tax such costs without any order referring the same for taxation, unless the court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the costs to be certified by the taxing master are to be recovered by subpœna.

All the affidavits filed on a motion need not be read in order to entitle the party succeeding to the costs of them. (*Freer* v. *Rimner*, 14 Sim. 391.) But they must be entered in the order. (*Stephens* v. *Lord Newborough*, 17 L. J. 332; 12 Jur. 319.)

PETITIONS.

A petition is a written statement of the applicant's case, concluding with a prayer founded upon that case. Petitions are of two kinds—*special*, and *of course*.

A petition *of course* is generally in a set form, varying only according to the facts and object of the petition: of this kind are petitions for leave to amend bills or claims—to assign guardians ad litem—to dismiss bills when the order sought for is acceded to or taken as a matter of right; and many others in the course of a suit which it would be needless to particularize here. On such petitions an order of course is granted either with or without the consent of the opposite party, as the case may be; but if the petitioner asks what, according to the ordinary practice, he is not strictly entitled to, in such case he must, as a general rule, obtain the consent, to be written on the petition, of the party to be affected by the order. A petition of course is written on paper, generally foolscap, as, being most frequently very short, one sheet will conveniently contain it. It must bear a 7*s*. Chancery stamp if at the Rolls, and is presented at the office of the secretary of the Rolls. In some few instances, however, it should be presented to the Lord Chancellor's

secretary; and on such occasions, as on a petition of right and other occasions, the fee payable by means of a stamp is either 10*s.* or 20*s.*, as the case may be.

The 29th General Order of the 21st December, 1833, provides, that with a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course, which, according to the practice of the court, may be presented to the Master of the Rolls, one of the secretaries of the Master of the Rolls shall, upon any such petitions of course (except upon petitions for setting down causes to be reheard), which shall be presented to his Honour, instead of answering such petitions as heretofore, draw up the orders thereon in such form as the Master of the Rolls shall from time to time direct, every such order to be signed as passed with the initials of such secretary; and the under secretary shall enter, or cause to be entered, every such order in a book to be kept at the secretary's office at the Rolls for that purpose, and shall then mark and sign such order with his initials as entered; and the suitors of the court and their solicitors shall have access to the said book, during office hours, without the payment of any fee. And for every such order, so to be made as aforesaid, there shall be paid the same fees as have hitherto been payable in respect of such petitions as aforesaid, in lieu of the fees on such petitions. And there shall be also paid to the chief secretary, for filing every such petition, the sum of 1*s.*; and to the under secretary, for entering every such order, the sum of 6*d.* And every such order, so to be made as aforesaid, shall have the same force and effect as orders of course passed by the registrars now have, and without the payment of the fees heretofore payable on such orders at the registrar's office; and for every office copy that may be required of any such order, there shall be paid to the chief secretary (who shall mark the same as examined, and authenticate it by affixing his initials thereto) the sum of 6*d.*, and no more, for making the same.

For the present scale of fees, see "*Fees*," infra.

The order at the Rolls is ready for delivery the following day; but if the case be urgent, it may be obtained even on the day of presentation, if applied for sufficiently early. The convenience of practitioners is much consulted in this respect. The order generally requires service.

In a petition of course every material fact necessary to be considered with reference to the object of the application should be stated, otherwise the order may be discharged. (*St. Victor* v. *Devereux*, 8 Jur. 26; *Wilkin* v. *Nainby*, 8 Beav. 465; 14 L. J. 402; 9 Jur. 611; *Marquis of Hertford* v. *Swisse*, 7 Beav. 160; *Cooper* v. *Lewis*, 2 Phil. 178.)

But although the order be irregularly obtained, it operates until discharged by the court. (*Blake* v. *Blake*, 7 Beav. 514.)

By the 13 & 14 Vict. c. 35, s. 29, it is provided, that so much of an act made and passed in the fifty-third year of the reign of his late majesty King George the Third, intituled "An Act to facilitate the Administration of Justice," as provides that the Vice-Chancellor appointed under that act shall have no power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by any Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal, unless authorized by the Lord Chancellor, Lord Keeper or Lords Commissioners for the time being so to do, nor any power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by the Master of the Rolls, and so much of an act made and passed in the fifth year of the reign of her present Majesty, intituled "An Act to make further Provisions for the Administration of Justice," as provides that no Vice-Chancellor appointed under the authority of that act shall have power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by any other Vice-Chancellor to be appointed under that act, not being a predecessor in office of such Vice-Chan-

cellor, nor any decree, order, act, matter or thing made or done by any Lord Chancellor, unless authorized by the Lord Chancellor so to do, nor any power or authority to discharge, reverse or alter any decree, order, act, matter or thing made or done by the Master of the Rolls or the Vice-Chancellor for the time being appointed in pursuance of an act passed in the fifty-third year of the reign of his majesty King George the Third, intituled "An Act to facilitate the Administration of Justice," shall be and the same are respectively hereby repealed so far as the same respectively apply to orders on motion or petition of course made by the Lord Chancellor, Master of the Rolls, or any of the Vice-Chancellors; and that it shall be lawful for the Master of the Rolls and the Vice-Chancellors respectively to discharge, reverse or alter any order made on motion or petition of course by any other of them, or by the Lord Chancellor. And by the 26th General Order of November, 1850, applications to discharge, reverse or alter any order made on motion or petition of course by the Lord Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, are to be made to the judge to whom special applications in the cause or matter in which such order is made ought to be made according to the practice of the court, and the general rules and orders applicable thereto.

Special petitions are of great variety, and are heard and disposed of in open court. They are most frequently drawn by counsel, but need not be signed by him.

The 120th General Order of May, 1845, provides, that where costs are to be taxed as between party and party, the taxing master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in

The service and execution of writs, and the service of orders, notices, petitions and warrants,

Advising with counsel on the pleadings, evidence and other proceedings in the cause,

Procuring counsel to settle and sign pleadings and such petitions as may appear to have been proper to be settled by counsel,

Procuring consultations of counsel,

Procuring the attendance of counsel in the master's offices upon questions relating to pleadings or title,

Procuring evidence by deposition or affidavit, and the attendance of witnesses,

and

Supplying counsel with copies of or extracts from necessary documents.

But in allowing such costs the taxing master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party.

Petitions, if in a cause, must bear the title of the cause. Besides which the following

Directions of Lord Lyndhurst as to the Titles of certain Petitions, are to be observed, viz.—In all cases where a petition is presented, under the authority of an act of parliament, to the Lord Chancellor, the petition must be entitled in the matter of that act and of a substantial matter also: and if it be a railway or other local act, and under its power a portion of the estate of any testator or intestate has been taken, the petition must be entitled in the matter of the estate of such testator or intestate; or if property settled by any deed of settlement, then in the matter of such settlement; or if land belonging to a rector, vicar or corporate body, then it must be entitled "Ex parte the rector, vicar or corporate body (*as the case may be*), and in the matter of the said act." In the case of legacies paid into court, under the act 36 Geo. 3, c. 52, and sought to be paid out, petitions may be entitled in the way the fund

stands in the accountant-general's books. Petitions under private acts of parliament may be entitled in the act alone.

Example 1.—In the matter of the Estate of George Woolley, deceased,
and
Of the South Devon Railway Act, 1844.

Example 2.—In the matter of the Settled Estates of A. B., deceased,
[and of the particular act.]

Example 3.—In the matter of the Settlement of John Jarvis and wife,
[and of the particular act.]

Example 4.—*Ex parte* The Rector of Woolwich,
[and in the matter of the particular act.]

Example 5.—In the matter of Jane Greaves, an infant legatee, and of the 36 Geo. 3, c. 52.

Example 6.—In the matter of an act for empowering the trustees of the estates of A. B., deceased, to grant leases, and for other purposes.

Special petitions are presented at the office of the secretary of the Lord Chancellor if to be heard by the Lord Chancellor, or the Court of Appeal or by one of the Vice-Chancellors; and to the secretary of the Master of the Rolls, if to be heard by that judge. They are presented in duplicate, and may be written on brief paper or otherwise, as may be most convenient, having regard to length; and they must bear a 20*s.* Chancery stamp. A day or two after presentation the petition answered may be obtained from the secretary. The answering of a petition not being, as the term imports, a grant or denial of what is prayed for, but merely an intimation written on the petition that the parties are to attend on a certain day in court, and that notice should be given forthwith. One copy of the petition is left, or rather retained, for the judge, and the other copy, which is in fact the original petition answered, as already mentioned, is taken away by the party presenting it, and should then be served upon all necessary parties.

The 6th General Order of the 11th of November, 1841,

requires, that all notices of motion not in any cause, and all petitions not in any cause, which are presented to the Lord Chancellor, shall be marked with the title of one of the Vice-Chancellors, and shall thenceforth be attached to such Vice-Chancellor's Court unless removed therefrom by any special order of the Lord Chancellor.

The General Order of the 5th of August, 1842, *after reciting that* by the 15th of the orders bearing date the 5th day of May, 1837, it is ordered, that in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any judge of the court, in the same manner as if the orders of the said 5th day of May had not been made; but that the orders which shall be made in any such interval by the Lord Chancellor, or by the Master of the Rolls, or by the Vice-Chancellor, shall, if not made by the judge to whom the application, if made during the ordinary sittings of the court would have been made, pursuant to the directions contained in the orders of the said 5th day of May, be marked as having been made for such judge, and shall, in the future proceedings of the cause, be deemed to be the order of such judge, in all respects, save this, that no order so made by one judge for another, under the circumstances aforesaid, shall be reheard, for the purpose of being discharged or varied, otherwise than by the Lord Chancellor: *and that*, by reason of the appointment of two additional judges of the High Court of Chancery, it has become necessary to extend the operation of the said recited order: and whereas, by the 5th of the orders bearing date the 11th day of November, 1841, it is ordered, "that all motions, petitions, and further proceedings, in causes in the Lord Chancellor's Court, except any motions or proceedings which were then part heard, should be had before the judge to whose court the same should, under the provisions of the said orders of the 11th day of November, 1841, be attached, unless removed there-

from by any special order of the Lord Chancellor:" *provides that* the said 15th Order of the said 5th day of May shall extend to applications for special orders to be made, in the interval therein mentioned, to, and also to orders to be made in such interval by, any judge of the Court of Chancery, as such court is now constituted, and that, subject to the provisions of the said 15th Order of the 5th day of May, 1837, the said 5th Order of the 11th day of November, 1841, shall not extend to applications and orders to be made in such interval as aforesaid. (See also *Holloway* v. *Philipps*, 22 L. J. 1091.)

The 7th General Order of the 29th of October, 1851, provides, that all motions, petitions, and further proceedings in causes and matters to which the foregoing orders refer, shall (subject to the provisions of the 15th of the General Orders of the 5th of May, 1837), be heard before the judges to whose court the same are, under the provisions of these orders, respectively attached, unless removed therefrom by any special order of the Lord Chancellor.

These orders do not refer to petitions or motions of course. (See *Magan* v. *Magan*, 16 Jur. 587.)

A petition presented by a person not a party to the suit must set forth his residence. (*Glazbrook* v. *Gillatt*, 9 Beav. 492.)

The service of a petition should be two clear days before the day appointed for hearing, and is effected by the delivery of a copy to each party, or each set of parties appearing by the same solicitor, and at the same time showing the original petition answered.

The 16th General Order of the 8th of May, 1845, art. 47, provides, that there must, unless the court gives special leave to the contrary, be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion, and at least two clear days between the service of a petition and the day appointed for hearing the

petition; but, in the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not to be reckoned.

If a solicitor has already appeared for a party in reference to the same matter or in the same suit, service on him will be good service, and this even need not be a personal service; for if it be upon his clerk or servant at his place of business, it is sufficient. The rules, however, as to service of a petition are similar to those regulating the service of a notice of motion, for which see "*Motions.*"

The evidence used in support of or against a petition, like that upon a motion, usually, but not necessarily, consists of affidavits and documents. By the 40th section of the act 15 & 16 Vict. c. 86, it is provided, that any party in any cause or matter may by subpœna ad testificandum or duces tecum require the attendance of any witness before an examiner of the court, or an examiner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any claim, motion, petition or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used on any claim, motion, petition or other proceeding before the court, shall be bound on being served with such writ to attend before an examiner for the purpose of being cross-examined; but the court shall always have a discretionary power of acting on such evidence as may be before it at the time, and of making such interim orders or otherwise as may appear necessary to meet the justice of the case. The court would not, however, in the case of a motion, stop the arguments to permit a party or witness to be examined, but stated that application should be made before the motion was brought on. (*Smith* v. *Swansea Dock Company*, 9 Hare, App.,

20; 16 Jur. 1130.) And under the same section, any persons making affidavits to be used on any claim, motion, petition or other proceeding before the court, not being the hearing of a cause, shall be bound, on being served with a subpœna ad test. or duces tecum, to attend before an examiner for the purpose of being cross-examined.

As to the necessary notice of examination or cross-examination to be given to the opposite side in the above cases, see ante, "*Proceedings for Plaintiffs by Bill.*"

Affidavits filed in the suit in which a petition was presented were allowed to be made use of on the hearing of the petition. (*Jones* v. *Turnbull*, 17 Jur. 851.) And where a petition was amended by altering the title, so that the affidavits already filed no longer corresponded in title with it, the court stated that they might be made evidence on the petition under the new title by a short affidavit referring to them, and that they might be made exhibits. (*In re Varteg Iron Works Wesleyan Chapel*, 10 Hare, App., 37.) And in support of a petition under the Trustee Act, 1850, the court received affidavits which had been filed in a cause in this court, such affidavits proving the pedigree of the parties. (*In re Pickance's Trust*, 10 Hare, App., 35.) But in that case previous notice should be given.

In all petitions under acts of parliament for sale of property for public purposes, when the purchase money is directed by the act to be paid into this court, the petitioners claiming to be entitled to the money so paid in must, in addition to the usual affidavit verifying their title, make oath, "That they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person to the sum of £—— in the petition presented by them in this matter mentioned, or any part thereof." (Exchcq. Order, 4th July, 1828; Letter from Lord Chancellor to Senior Registrar, 12th February, 1842.)

On the day appointed the petition will appear in the daily printed list of the judge and will be called on in its turn,

the course being generally to hear all the unopposed petitions before calling on those which are opposed.

The brief or briefs will, of course, have been previously delivered, and will consist of brief copies of the petition and all the affidavits and other evidence, if any, in support, if unopposed, and on both sides, if opposed. To these may be added any relevant observations that may appear necessary.

Refresher fees are not payable to counsel on petitions, though they stand over from one term to another.

Under the 15 & 16 Vict. c. 86, one Vice-Chancellor has jurisdiction to hear a petition for another Vice-Chancellor. (*Holloway* v. *Philipps*, 22 L. J. 1091.) Where leave was given to amend a petition, and in amending it, facts were stated which occurred after such leave was given, the petition was dismissed with costs. (*Doubtfire* v. *Elworthy*, 15 Sim. 77 ; 9 Jur. 1083.)

The 27th General Order of December, 1833, provides, that each registrar shall attend in succession the three several courts of the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellor ; and that for the purpose of avoiding, as much as may be, expense and delay in the drawing of the decrees and orders of this court, it is hereby directed, that (except in orders for special injunctions, in which the usual recitals shall be inserted as heretofore,) neither the bill nor answers nor any part thereof be stated or recited in the original decree or order ; and that no part of the master's report be stated in any decree upon further directions, except the master's finding or opinion upon the subject referred to him ; and that in orders made upon petitions no part of the petition be stated or recited except the prayer ; and that the same principle of brevity be observed in all the orders of this court made upon motion, so far as may be consistent with a statement explaining the grounds upon which the order is made. And for the better understanding of this order, certain forms of decrees and orders drawn pursuant hereto are subjoined. And it is ordered that such forms

shall be observed in all cases as nearly as may be, and that before any order made on a petition be passed, the original petition be filed with the clerk of the reports.

Where the original petition was lost the court allowed the copy left for the use of the judge to be filed in its stead. (*Smith* v. *Harwood*, 1 Sm. & Giff. 137.) And in a similar case the court allowed a copy, certified by the under-secretary at the Rolls to be a true copy, to be filed instead. (*Saunderson* v. *Walker*, 1 M. & C. 359.) So where the petitioner withheld the original from the respondents, the court allowed the copy served to be filed. (*Andrews* v. *Walton*, 1 M. & C. 360; see also *Re Hobler*, 9 Jur. 419.)

Any party served with a petition is entitled to his costs of appearing upon it, though he has no interest in it. (*Marks* v. *Marks*, 18 L. J. 171.)

A petition was allowed to be amended in consequence of the marriage of the petitioner, without a fresh stamp being required. (*Robinson* v. *Harrison*, 1 Drew. 307.)

By a regulation of the court, dated 17th February, 1853, it is provided, that where an unopposed petition is directed by either of the Vice-Chancellors to stand over to amend, or to obtain further evidence with liberty to mention it any morning, the registrars, upon application of the solicitor or counsel, may put such petition in the paper for the following day, such day not being a motion day, unless the registrar applied to shall consider, that by so doing it will interfere with the regular business of the day; and in that case he is to put it in the paper for the next day.

The affidavit of service of a petition may be in the following form:—

Form of Affidavit of Service of Petition.

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. & E. F. ..... Defendants.

I, ——, of ——, make oath and say as follows:—

1. I did on ——, the —— day of —— [before eight o'clock in

the evening], serve Mr. ——, the solicitor or agent of the defendant C. D. in this cause with a petition, presented in this cause by the above-named plaintiff to the Right Honourable the Lord High Chancellor of Great Britain, with his Lordship's fiat thereon, dated the —— day of ——, whereby all parties concerned, &c. [*reciting the fiat*], by delivering to and leaving with a clerk [*or, as the case may be*] of the said Mr. —— a true copy of such petition, and of the said fiat thereon, at the office of the said Mr. ——, situate at ——, and at the same time showing to the said clerk the said original petition with such fiat thereon as aforesaid.

2. I did on the same —— day of —— [before eight o'clock in the evening], also serve Mr. ——, the solicitor or agent of the defendant E. F. in this cause with the said petition, with the said fiat thereon, by delivering to and leaving with a clerk [*or, as the case may be*] of the said Mr. —— another true copy of such petition and of the said fiat thereon, at the office of the said Mr. ——, situate at ——, and at same time showing to the said last-mentioned clerk the said original petition, with such fiat thereon as aforesaid.

Sworn, &c.

[*If the service is effected more than two clear days before the day appointed for hearing the petition, the time of day need not be stated.*]

AFFIDAVITS.

All affidavits used in this court are to be taken and expressed in the first person of the deponent (126th G. O., 8th May, 1845); and all copies of affidavits are to be ready for delivery within forty-eight hours after the same are bespoke. (127th ibid.) Any solicitor, party or person filing an affidavit not taken and expressed in the first person of the deponent is not to be allowed the costs of preparing and filing such affidavit in any taxation of costs. (128th ibid.)

All affidavits used in this court must be divided into paragraphs, and every paragraph must be numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject. (15 & 16 Vict. c. 86, s. 37.) It is sufficient if a solicitor's clerk describes himself as clerk to such solicitor, giving the solicitor's address. (*Boddington v. Woodley*, 12 L. J. 15.)

All affidavits, whether to be used at the hearing of a cause, or on any other proceeding before the court, are to state distinctly what facts or circumstances deposed to are within deponent's own knowledge and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him, by reason of information derived from other sources than his own knowledge, and what such sources are. (8th G. O., 13th January, 1855.) The costs of affidavits not in conformity with the preceding order are to be disallowed on taxation, unless the court should otherwise direct. (9th ibid.)

An affidavit is insufficient, unless it expresses that the deponent made oath (*Prentice* v. *Phillips*, 2 Hare, 542; 12 L. J., 497; 7 Jur. 528); and if it be an affidavit of service of an order, it must state that the order was duly passed and entered. (*Willetts* v. *Willetts*, 5 Hare, 597.)

It must be engrossed in words at length, figures and erasures not being allowed; and alterations and interlineations must be marked with the initials of the officer administering the oath.

By the 11th General Order, 1st June, 1854, it is provided, that expenses incurred in consequence of affidavits being prepared or settled by counsel, are to be allowed only when the taxing masters shall in their discretion, and on consideration of the special circumstances of each case, think such expenses properly incurred; and in such case they are to be at liberty to allow the same or such parts thereof as they may consider just and reasonable, whether the taxation be between solicitor and client or between party and party.

When an affidavit, sworn before a British consul abroad, refers to a paper writing annexed by a ribbon under the consular seal, but which paper bears no reference on the face of it to the affidavit, it is irregular, and cannot be filed. (*Hewetson* v. *Todhunter*, 22 L. T. 315.)

Where a mistake was made in the title of affidavits, by reversing the names of the plaintiff and defendant, they were allowed to be taken off the file, and resworn in their proper title without fresh stamps. (*Pearson* v. *Wilcox*, 10 Hare, App., 35; 1 Eq. Rep. 239.)

. .

The following is a specimen of the form of an affidavit:—

In Chancery.

Between A. B. ..... Plaintiff;
and
C. D. ..... Defendant.

I. E. F. of ——, in the county of ——, gentleman, make oath and say as follows:—

1. I was present and did see, &c. &c.

2. The above-named defendant was apprised, &c. &c.

Sworn at the Record and Writ Clerks' Office, Chancery Lane, in the county of Middlesex, the —— day of ——, 1854.
Before me,

[*or*] Sworn at my office [*or* place of business], situate at No. —, Bedford Row, in the county of Middlesex, this —— day of ——, 1854.
Before me,

[*or*] Sworn at [No. —, *or otherwise describing the house or place where the oath is administered*], in the county of ——, this —— day of ——, 1854.
Before me,

[*or*] Sworn at Leamington, in the county of Warwick, [*or, as the case may be,*] the —— day of ——, 1854.
Before me,

[*or*] Sworn at ——, in the county of ——, the —— day of ——, 1854, by the said deponent E. F., the same having been first read over to him in my presence, when he appeared perfectly to understand the nature and effect thereof, and made his mark thereto.
Before me,

[*or*] Sworn by the said A. B. and C. D. at &c.
Before me,

By the 6 & 7 Vict. c. 82, s. 1, it is enacted, that the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal for the time being, shall have such and the same powers for granting commissions for the purpose of enabling fit and proper persons to take and receive affidavits, affirmations and declarations in Scotland and Ireland, and to perform the other duties of masters extraordinary of the High Court of Chancery in England, as he and they then had in any part of the kingdom of England.

By the 33rd General Order, 21st December, 1833, it is

provided, that the masters extraordinary of this court shall be at liberty in future to take any affidavit, or do any other act incident to the office of master extraordinary in Chancery, at any place which is distant not less than ten miles from the Hall in Lincoln's Inn, any existing order to the contrary notwithstanding.

The 6 & 7 Vict. c. 82, s. 4, provides, that every such person authorized to act under any such commission as aforesaid shall be entitled to receive and take such and the same fees, and none other, as masters extraordinary of the High Court of Chancery in England then were entitled to by virtue of the orders of that court, or of any act or acts of parliament now in force.

It is not necessary to verify the fact that the officer fills that character. (*Day* v. *Day* and *Re Mahon's Trust*, infra, p. 505.)

By the 16 & 17 Vict. c. 78 (The Oaths in Chancery Act), the office of master extraordinary in Chancery is abolished.

The 1st section of that act enacts, that the persons now styled "masters extraordinary in Chancery" shall cease to be so styled, and they and all persons hereafter appointed by the Lord Chancellor to execute like duties in England shall be designated "commissioners to administer oaths in Chancery in England," and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of master extraordinary in Chancery by virtue of any statute or order of the Court of Chancery or of the Lord Chancellor, or usage in that behalf, or otherwise.

By the 2nd section, the Lord Chancellor is empowered from time to time to appoint any persons practising as solicitors within ten miles from Lincoln's Inn Hall at their respective places of business to administer oaths and take declarations, affirmations and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled "London commissioners to administer oaths in Chancery;" and they shall be entitled to charge and take a fee

of 1*s.* 6*d.* for every oath administered by them, and for every declaration, affirmation or attestation of honour taken by them, subject to any order of the Lord Chancellor varying or annulling the same.

The 3rd section enables the Lord Chancellor from time to time to appoint any persons practising as solicitors in the Isle of Man, in the Channel Islands, or any of them, to administer oaths and take declarations, affirmations and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled "commissioners to administer oaths in Chancery for the Channel Islands," and they shall be entitled to charge and take the same fees as the said "commissioners to administer oaths in Chancery."

The 4th section provides, that the fiat or document by which any such commissioners as aforesaid shall be appointed shall bear a Chancery stamp of 1*l.*, in lieu of the stamp of 5*s.* now required; but no other charge or fee shall be made or payable in respect of such appointment, or of anything requisite to be done in order to perfect the same; and it shall not be necessary that any such appointment should be published in the London Gazette.

And the 5th section provides, that nothing contained in that act shall abridge or lessen the power of the Lord Chancellor as it now exists to appoint fit persons to administer oaths and take declarations, affirmations and attestations of honour in Chancery, or to regulate the fees to be taken by them; and where any act of parliament refers to the masters extraordinary in Chancery, or to their powers or duties, the reference shall be held to apply and include the commissioners hereinbefore mentioned, or to their powers or duties, as the case may be.

Commissioners appointed under the above act can administer oaths in Chancery at any place within their respective districts, the words "at their respective places of business" being only used to indicate the area within which they are to be taken as "practising." (*Re the Oaths in Chancery*

Act, 2 Eq. Rep. 175; 22 L. T. 249; *Re the Clerks of Records and Writs*, 18 Jur. 499.)

As before this act a solicitor in the cause or matter could not act as a master extraordinary (*Re Hogan*, 3 Atk. 812; *Hopkins* v. *Hopkins*, 10 Hare, App., 2; 17 Jur. 343), nor any clerk to such solicitor (*Wood* v. *Harpur*, 3 Beav. 290), a commissioner being a solicitor in the cause or his clerk, if in other respects qualified, cannot so act. A writ of ne exeat regno and the proceedings taken under it were discharged with costs, on the ground that the affidavits upon which it was obtained were sworn before the plaintiff's solicitor. (*Hopkins* v. *Hopkins*, supra.)

Affidavits may also be sworn before the chief clerks of the Chancery judges, by virtue of the 15 & 16 Vict. c. 80, s. 30, for the purposes of any proceedings pending before them.

The jurat of an affidavit should disclose the place where it is sworn; but an affidavit sworn before a notary, certified by the Governor of New York to be a notary public of the county Niagara, was allowed to be filed, although the jurat did not show where the affidavit was sworn. (*Meek* v. *Ward*, 10 Hare, App., 1; 21 L. T. 334.) And an affidavit sworn before a master extraordinary in Ireland was admitted by this court without proof of the official character of the person administering the oath. (*In re Mahon's Trust*, 9 Hare, 459; see also *Day* v. *Day*, 11 Beav. 35.)

If an affidavit is to be sworn out of the jurisdiction of the court, the 22nd section of the 15 & 16 Vict. c. 86, will afford facilities for that purpose. It enacts that all pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations and attestations of honour in the Court of Chancery, and all acknowledgments for enrolling any deed in that court, may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation or place under the dominion of her majesty, before any judge, court, notary public or person lawfully authorized to administer oaths in such places respectively; or in foreign

parts out of her majesty's dominions, before any of her majesty's consuls or vice-consuls; and the judges and other officers of the Court of Chancery shall take judicial notice of the seal or signature of any such court, judge, notary public, person, consul or vice-consul, attached, appended or subscribed thereto, or to other documents to be used in the said court. Affidavits sworn before the operation of the act are within this section, and it is unnecessary to prove the signature to make them evidence (*Bateman* v. *Cooke*, 17 Jur. 170; 21 L. T. 1); but a certificate of registration of a deed by a registrar of deeds in a colony not authorized to administer an oath, is not made evidence by this section, the signature of the registrar requiring proof. (*Baillie* v. *Jackson*, 17 Jur. 170; 21 L. T. 1.) Unless the court desires the information, affidavits filed after a motion has been opened are inadmissible.

The 6th section of the 16 & 17 Vict. c. 78, after reciting that it is expedient to extend the provisions of that act relating to *pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations, attestations of honour and acknowledgments*, for the purpose of diminishing the expense of and incident to registration of deeds, wills and other documents or things, enacts, that such provision shall extend to the Isle of Man, *and that all affidavits, declarations and affirmations* to be used before any registrar or other officer of any registry office in Great Britain or Ireland, for any purpose connected with registration of deeds or wills, or other documents or things, under the authority of parliament, *may be sworn and taken* in Scotland or Ireland, the Isle of Man, or the Channel Islands, or in any colony, island, plantation or place under the dominion of her majesty in foreign parts, *before* any court, judge, notary public or person hereby or otherwise lawfully authorized to administer oaths in such country, colony, island, plantation or place respectively, *or before* any of her majesty's consuls or vice-consuls in any foreign parts out of her majesty's dominions;

and *all registrars and other officers* of any such registry office *shall take judicial notice* of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul or vice-consul, which shall be attached, appended or subscribed to any such affidavit, declaration or affirmation, or any other document; and that the enactments contained in the said 23rd and 24th sections shall be deemed to be incorporated therein as effectually as if the same enactments were expressly re-enacted in the now stating act and applied to registry offices.

By the 15 & 16 Vict. c. 87, s. 27, the affidavit office is abolished; by the 28th section the duties of that office are transferred to the record and writ clerks; and by the 29th section it is provided, that from and after the 28th October, 1852, the duties of the affidavit office of the Court of Chancery shall be performed by the clerks of records and writs; but affidavits or affirmations may be sworn, affirmed or attested upon honour and declarations made before the clerk of inrolments for the time being, as occasion may require, for the better despatch of business.

Before swearing an affidavit, the deponent signs his name opposite the jurat, and this will not be dispensed with (*Anderson* v. *Stather*, 9 Jur. 1085), unless he cannot write, in which case the affidavit must be read over to him, and he must make his mark, and this should be stated in the jurat. A marksman having signed his name, his hand being guided for the purpose, the affidavit was ordered to be taken off the file. (——— v. *Christopher*, 11 Sim. 409.) If there are several deponents sworn at the same time, the name of each should appear in the jurat. All exhibits must be marked by the officer as having been produced to the deponent at the time of swearing.

Affidavits having reference to the *taxation of costs* may be sworn before the taxing master. (9th G. O. Oct. 1842.)

For directions respecting affidavits in support of and in

opposition to a motion for a decree or decretal order, see that heading.

The office copies of affidavits, and not their originals, are used in chambers as well as in court, and previous notice of the intention to read any affidavit in chambers must be given to the opposite party.

Whenever a defendant to a claim admits by his affidavit that a balance is in his hands in which the plaintiff is interested, the court will on motion order him to pay it into court. (*Jefferies* v. *Biggs*, 20 L. J. 638; 17 L. T. 162.) This is, perhaps, but carrying out the principle of the decision in the case of *Cockburn* v. *Green* (20 L. J. 216), where Vice-Chancellor Knight Bruce directed the defendants' affidavits to be treated in all respects as if they were their answers to bills filed against them; so also, according to a decision of Vice-Chancellor Turner not reported, may such order be made at the hearing, but not afterwards, except by consent. If the defendant states that he is a creditor to a larger amount than he has in hand, the order to pay in will not be made. (*Silver* v. *Stein*, 1 Drew. 295.)

If a defendant to a claim admits by his affidavit the possession of documents material to the plaintiff's case, he will be ordered to produce them. (*Jefferies* v. *Biggs*, supra.)

As to affidavits in support of creditors' and other claims at chambers, see "*Proof of Debts and other Claims.*"

The case of *Smith* v. *Constant* (20 L. J. 126; 15 Jur. 97; 16 L. T. 359, 406), which was the case of a contested claim before the Vice-Chancellor Knight Bruce, decides that in the cases above referred to the affidavit of the defendant has the same degree of weight as an answer in a cause heard on bill, answer, replication and depositions. So also in *Nowell* v. *Beaumont* (16 L. T. 359); and see further observations upon the weight to be ascribed to evidence by affidavit in the case of *Att.-Gen.* v. *Lord Carrington* (4 De G. & S. 140; 15 Jur. 266).

Affidavits may be filed at any time before the discussion (*Ex parte Leicester*, 6 Ves. 431, a), unless a time has been fixed by the court; but affidavits filed after a motion has been opened cannot be read, although the court will at any time before the opening postpone the motion to give an opportunity for answering affidavits. (*Electric Telegraph Company* v. *Nott*, 11 Jur. 273.)

Affidavits of service must be filed before the rising of the court on the same day as the order is made. (*Lord Milltown* v. *Stuart*, 8 Sim. 34.)

Affidavits filed in the suit were allowed to be made use of on the hearing of a petition. (*Jones* v. *Turnbull*, 17 Jur. 851; 22 L. J. 1055.) But if it is intended to use any affidavits previously filed in the cause, notice of such intention should be given. If one party gives such a notice, and does not read the affidavits, the other may. (*Cauty* v. *Houlditch*, 14 Sim. 75.)

Where a petition was amended by altering the title, so that the affidavits already filed in support of it no longer corresponded in title with it, the court stated that the affidavits might be made evidence on the petition under the new title by a short affidavit referring to them, and that they might be made exhibits. (*In re Varteg Iron Works Wesleyan Chapel*, 10 Hare, App., 37.) And in support of a petition under the Trustee Act, 1850, the court received affidavits which had been filed in a cause in this court, such affidavits proving the pedigree of the parties. (*In re Pickance's Trust*, 10 Hare, App., 35.)

All the affidavits filed need not be read in order to entitle a party moving to the costs of them (*Freer* v. *Rimmer*, 14 Sim. 391); but they must be entered in the order. (*Stephens* v. *Lord Newborough*, 17 L. J. 332; 12 Jur. 319.)

Affidavits may now be used on the hearing of the cause, viz. for the purpose of proving documents, instead of producing a witness to prove the handwriting or execution

. .

(43rd G. O., 26th Aug. 1841); but to authorize the use of such affidavits, an order of course for leave so to prove the exhibits in question must be obtained and served at least two clear days before the hearing. The execution of a deed may be proved on behalf of the plaintiff by affidavit at the hearing, even if the answer has not been replied to, when such answer does not deny the execution. (*Chalk* v. *Raine*, 7 Hare, 393.)

Again, under the 28th section of the 13 & 14 Vict. c. 35 (Sir George Turner's Act), the court may, notwithstanding any rule or practice to the contrary, at the hearing of any cause, or of any further directions therein, receive proof by affidavit of all proper parties being before the court, and of all such matters as are necessary to be proved for enabling the said court to order payment of any monies belonging to any married woman, and of all such other matters not directly in issue in the cause as in the opinion of the court may safely and properly be so proved. But affidavits as to matters directly in issue in the cause after the filing of the chief clerk's certificate, will not be admitted on the hearing for further consideration. (*Farmer* v. *East*, 23 L. T. 252.)

Again, under the 36th sect. of the 15 & 16 Vict. c. 86, affidavits by particular witnesses, or affidavits as to particular facts or circumstances, may, by consent or by leave of the court obtained upon notice, be used on the hearing of any cause; and such consent, with the approbation of the court, may be given by or on the part of married women or infants, or other persons under disability.

Also when, according to the new practice, as stated ante, the parties think proper, or it is ordered that the evidence, either wholly or partially, shall be by affidavit, affidavits will then, of course, be properly used at the hearing of the cause.

On the hearing for further directions, the question before

the court being one of costs, the court admitted, as part of the evidence in the cause, an affidavit filed after the making of the master's report, showing grounds why the plaintiff should be allowed his costs, charges and expenses. (*Fallows* v. *Lord Dillon*, 23 L. T. 154.)

Affidavits filed before issue joined may be read at the hearing of a cause; but by the 6th General Order of 13th January, 1855, no such affidavit shall be received without special leave of the court at the hearing, unless within one month after issue joined, or such longer time as may be allowed by special leave of the court, notice in writing shall have been given by the party intending to use the same to the opposite party of such intention.

Also, upon the hearing of a motion for a decree or decretal order, affidavits are properly used.

In some cases pointed out by the 59th section of the last-mentioned act, an answer is to be treated as an affidavit. [See "*Injunction*" and "*Receiver*," ante.] So also, on the hearing of a motion for a decree or decretal order, if any answer has been filed, it is treated as an affidavit. [See "*Motion for Decree or Decretal Order*," ante.]

As to the cross-examination and re-examination of witnesses making affidavits, see "*Injunction*," "*Evidence for the Hearing*," ante.

By the 1 Will. 4, c. 36, s. 15, r. 20, wardens, keepers, &c. of prisons and their deputies are required to be appointed masters extraordinary for taking affidavits and answers of prisoners.

The 127th General Order of the 8th May, 1845, provides, that all copies of affidavits are to be ready for delivery within forty eight hours after the same are bespoke.

As already stated, the office copies of the affidavits to be used must have been obtained, and must be in court at the hearing (*Jackson* v. *Cassidy*, 10 Sim. 326); and although in an urgent case during the long vacation, the court may

take the original affidavits into its custody and act on them as if filed, yet, during the ordinary sittings of the court, office copies alone can be used. (*Attorney-General* v. *Lewis*, 8 Beav. 179.)

Process of Contempt.

ATTACHMENT.

This writ issues either to compel an appearance or an answer, or to enforce obedience to a decree or order of the court. It is usually directed to the sheriff or other officer of the county or jurisdiction in which the party against whom it issues resides, commanding him to attach such party, so as to have him before the court on a particular day therein mentioned to answer the contempt. But when the party is already in prison, it is directed to the keeper of the prison or his deputy there. And when the party is within the jurisdiction of the counties palatine, a different direction is requisite. (See infra, p. 513.) All process of contempt is to be made out into the county where the party prosecuted is resident, unless he is then in or about London, in which case it may be directed into the county where he then is. (Beam. Ord., 199.)

Form of Writ of Attachment.

Victoria, &c.

To the Sheriff of —— [*or, as the case may be*], greeting.

We command you to attach ——, so as to have —— before us in our Court of Chancery immediately after the receipt of this writ [*or naming a general return day*] [*or*, "on the twentieth day of December, next ensuing"], wheresoever the said court shall then be, there to answer to us as well touching a contempt which ——, as it is alleged, committed against us, as also such other matters as shall be then and there laid to —— charge, and further to perform and abide such order as our said court shall

make in this behalf; and hereof fail not, and bring this writ with you.

Witness ourself at Westminster, &c.

ROMILLY, M. R.

Direction of Attachment to Lancaster or Durham.

VICTORIA, &c.

To our Chancellor of our County Palatine of [Lancaster *or* Durham], or his deputy there, greeting.

We command you that by our writ, under your seal of our aforesaid county, duly issued, you command the sheriff of our aforesaid county to attach, &c.

Indorsement for want of Appearance.

By the court.

For not appearing at the suit of A. B. and others, complainants.

[*Name and address of plaintiff's agent and solicitor.*]

Indorsement for want of Appearance of Husband and Wife.

By the court.

For want of the appearance of the within-named C. D. and his wife, at the suit of A. B. and others, complainants.

[*Name and address of plaintiff's agent and solicitor.*]

An office copy affidavit of service of copy bill with indorsement is required, and a præcipe.

Indorsement for want of Answer.

The same as for want of appearance, substituting the words "for not answering" for "for not appearing."

Indorsement for Nonpayment of Costs.

By the court.

For not paying the sum of —— pounds costs to A. B., in a cause wherein the said A. B. is complainant and the within-named C. D. and others are defendants.

[*Name and address of plaintiff's agent and solicitor.*]

Form of Præcipe.

B. v. D. } Seal an attachment directed to the sheriff of —— [*or as may be*], against C. D., for not paying the sum of —— costs to A. B. [*or as may be*] in a cause wherein the said A. B. is plaintiff and the said C. D. is defendant.

Returnable
Tested

[*Name and address of plaintiff's solicitor and agent.*]

Indorsement for Nonpayment of Money into Court.

By the court.

For breach of an order dated the —— day of ——, one thousand eight hundred and fifty-four, made in a cause wherein A. B. is complainant, and the within-named C. D. and others are defendants, in not paying the sum of —— into the Bank, in the name and with the privity of the accountant-general of this court, to be there placed to the credit of the said cause, as by the said order the within-named C. D. was commanded.

[*Name and address of plaintiff's solicitor and agent.*]

Indorsement for Nonpayment of Money to a Plaintiff or Defendant.

The form is similar to the last, inserting the mandatory part of the order in the indorsement.

Indorsement for not leaving Books and Papers.

Similar form to the last.

It will have been seen, therefore, that the body of the writ is the same, whether for want of appearance or answer, for non-payment of costs or for any other purpose, but the indorsement differs according to the circumstances. The 16th Order of the 8th May, 1845, arts. 3, 13, 14, 15 and 16, point out cases in which an attachment may issue for want of appearance or plea, answer or demurrer.

The writ may regularly issue, notwithstanding that a similar writ has previously issued upon the same contempt against the same party, but not acted on. (*Andrews* v. *Walton*, 1 Phil. 619.) But it cannot issue for want of answer against a bankrupt defendant who had become

bankrupt before answer, the fact of bankruptcy appearing by supplemental bill. (*Robertson* v. *Southgate*, 10 Jur. 1051.)

The return of this writ, and the several other writs issuable in process of contempt, may be "*immediately*," as shown by the form already given, when the party in contempt resides or is in London, or within twenty miles thereof, and in other cases the writ may be returnable in vacation, so that there be fifteen days between the teste and the return. (1 Will. 4, c. 36, s. 15, r. 3.) An attachment returnable in vacation is good, notwithstanding the return be more than fifteen days after the teste. (*Wroe* v. *Clayton*, 16 Sim. 183; 12 Jur. 321.) It may also be made returnable in term on a general return day, and in that case the fifteen days are not required. It may also be made returnable and executed after the term next following the date of the sealing. (Ibid.) The 3rd rule of sect. 15, 1 Will. 4, c. 36, is permissive, and a writ returnable in vacation is good if there be at least fifteen days between the teste and the return. (Ibid.) The return days are fixed for each term, and may be ascertained at the time of sealing the writ. An attachment for want of answer returnable immediately against a defendant resident out of the jurisdiction, is irregular. (*Zulueta* v. *Vinent*, 15 Beav. 273; 16 Jur. 631; 21 L. J. 414.)

An attachment does not issue against *a peer*, nor against *a member of parliament*, nor against *a corporation*. (See "*Distringas*" and "*Sequestration*," infra.) It formerly issued against *an infant*, but was not executed, a motion for a messenger to bring the infant up being made, and the attachment being sealed. When brought up by the messenger a guardian ad litem was appointed to appear and defend the suit. But a better and more reasonable practice is introduced by the General Orders of May, 1845, for appointing a guardian to enter an appearance for an infant, and defend the suit. If *husband and wife* are defendants, and the

husband neglects to appear for the wife after service, the attachment goes against him; and if the wife neglects to answer, an attachment issues against the husband, but he will be relieved by the court, on satisfying the court that he cannot prevail upon his wife to answer, as the court will order that she may answer separately, and that he may not be liable to process. (*Emery* v. *Wase*, 5 Ves. 847; and see *Barry* v. *Cane*, 3 Madd. 472; and *Garey* v. *Whittingham*, 1 S. & S. 163.) Where the husband had entered an appearance for his wife, but being unable to procure her to join with him in putting in a joint answer, he had become liable to process for contempt, an order was made on the plaintiff's motion, with notice to the wife, that she might, separately from her husband, plead, answer or demur, not demurring alone, within six weeks from service of the order. (*Woodward* v. *Conebear*, 8 Jur. 642; see also *Bray* v. *Akers*, 15 Sim. 610.) The wife cannot be attached, though the husband be abroad, unless an order is obtained that she may answer separately. (*Bunyan* v. *Mortimer*, 6 Madd. 278.) So if the bill be amended after a joint answer. (*Tarleton* v. *Dyer*, 10 Ves. 442.) The foregoing applications are granted on notice being given to the wife. See also *Jackson* v. *Haworth* (1 S. & S. 161), and *Taylor* v. *Taylor* (12 Beav. 271; 19 L. J. 304), where an order was made ex parte for an attachment against a married woman for want of answer, the suit affecting her separate estate, and she having obtained an order to answer separately from her husband; and *Thicknesse* v. *Acton* (15 Jur. 1052), where the V. C. Turner observed that he did not see what other process could be had. (See also *Estcourt* v. *Ewington*, 9 Sim. 252.)

An attachment does not issue against the *attorney-general* for non-appearance, or not answering, his not doing so being considered as a nihil dicit. Nor will he be ordered to appear. (*Barclay* v. *Russell*, Dick. 729.) But the bill may be taken pro confesso against him for want of answer, and

there may be substituted service. (*Groom* v. *Attorney-General*, 9 Sim. 325.)

The writ is prepared by the solicitor or party under the General Orders of October, 1842 (Orders 4 & 16), and if for want of appearance or answer must bear a Chancery stamp of 8*s.*; but if for any other purpose the fee would appear, according to the General Order of 25th October, 1852, to be 20*s.* (G. O., 25th October, 1852.) A præcipe must be made out and left with the Clerk of the Entries at the Registrar's Office, who will mark the writ as entered, and another præcipe must be handed to the Record and Writ Clerk at the time of tendering the writ of sealing. If the attachment is for want of appearance, as already shown, an affidavit of service of a copy of the bill, with the indorsement, must be made and filed before the writ can be sealed; and if for want of answer there must be an affidavit of the delivery of a stamped copy of the interrogatories. If for costs, an affidavit of service of subpœna, demand and non-payment is required; if for non-payment of money, an affidavit of service of order, demand and non-payment; if for non-payment of money into court, an affidavit of service of order and the accountant-general's certificate of non-payment. If for not depositing books and papers, there must be an affidavit of service of order, and that they are not deposited. The date of the appearance is no longer the guide of the record and writ clerk for issuing an attachment for want of answer, as the time for filing a compulsory answer does not, according to the new practice, run from the time of entering the appearance.

If, however, the fact of a subsequent order for further time is brought to the knowledge of the record and writ clerk he will take cognizance of it; but if he is not aware of any such order the attachment is sealed upon the affidavit of delivery, at the risk of the party suing it forth, although of course it cannot in any case issue for want of answer before the expiration of the time allowed by the

practice of the court for answering. It must be entered in the registrar's book before it can be issued, otherwise it is irregular. (*Smith* v. *Thompson*, 4 Madd. 179.)

The 72nd of the Orders of May, 1845, provides for an attachment issuing by special order against a *defendant, who, there is just reason to believe, means to abscond before answering*, and in that case it will be made returnable at such time as the court directs.

The attachment is executed by the officer to whom it is addressed, whether sheriff or gaoler, as the case may be; and if the party to be attached be at large, such instructions respecting him are given as may be necessary.

The sheriff may, if he pleases, take bail for the appearance of the party when required, if the attachment be for want of appearance or answer, but not otherwise. He will be ordered to make his return to the writ by order of course obtainable on motion or petition of course after the return thereof, in case he neglects to return it; and such order being duly served may be followed up by a notice of motion for an order, naming a further day for the return, or that he may stand committed, and subsequently he may, if he still neglects, be actually committed.

When the sheriff returns *that he has attached the defendant, whose body he has ready*, there should then be made a motion of course for the messenger attending the court to bring the defendant to the bar of the court to answer his contempt; unless the process be to compel appearance, in which case this motion cannot now be made. (7th G. O., August, 1841.) This order being drawn up, the messenger will proceed to apprehend the defaulter, and bring him to the bar of the court. This must be done (see 73rd G. O., May, 1845) in case of want of answer within ten days after he is taken into custody, or he will be discharged without payment of costs of contempt, which in such case are to be paid by the plaintiff; but if the answer is not put in within eight days after such discharge, a new attachment may be

issued for want of answer. The 1 Will. 4, c. 36, s. 15, r. 5, also relates to this part of the subject, and runs in very similar terms to those of the order just quoted, also limiting ten days for bringing the defendant to the bar of the court, or, if the last of the days be out of term, then that step is to be taken within the first four days of the ensuing term, *and it also includes contempt for not appearing*, which, however, need not be further noticed here, in consequence of the facilities now afforded for entering an appearance for a defendant.

When a prisoner was labouring under an attack of paralysis, and his removal would be attended with danger, he was allowed to remain in custody, as if he had been brought up to the bar and remanded. (*Jervis* v. *Browning*, 2 Jur. 917.) If a defendant is turned over after the time limited he will be discharged with costs. (*Greening* v. *Greening*, 1 Beav. 121.) When a defendant was attached for want of appearance, and was discharged under the 1 Will. 4, c. 36, s. 15, r. 5, before an appearance was entered for her, it was held, that, though a fresh subpœna might be issued, no attachment could be taken out upon it. (*Williams* v. *Townshend*, 6 Sim. 296.)

The defendant being brought up, the plaintiff moves that he may be turned over to the Queen's Prison, which is ordered accordingly, and the messenger hands him to the tipstaff, by whom he is placed in the custody of the keeper of the prison.

A party prosecuting a contempt for *non-payment of costs* is not bound to turn the prisoner over to the Queen's Bench Prison, but the prisoner may procure himself to be turned over by habeas corpus, to enable him to participate in the provisions of the 1 Will. 4, c. 36. (*Wroe* v. *Clayton*, 16 Sim. 183 ; 12 Jur. 321.)

When the sheriff returns *that he has attached the defendant and sent him to prison*, then, instead of a messenger, the plaintiff should move for an *habeas corpus* to bring him

into court, and the court will order him to be turned over to the Queen's Prison.

Form of Habeas Corpus.

VICTORIA, &c.

To ——, greeting.

We command you that you do on ——, the —— day of —— next, bring before us in our Court of Chancery, wheresoever it shall then be, the body of ——, by whatsoever name or addition of name he is known or called, who is detained in your custody, together with an account of the cause or causes of his being taken into and detained in custody, to perform and abide such order as our said court shall make in this behalf; and hereof fail not, and bring this writ with you.

Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

ROMILLY, M. R.

Indorsement.

By the Lord High Chancellor of Great Britain.

At the instance of A. B.

[*Name and address of plaintiff's solicitor and agent, if any.*]

The 74th General Order of May, 1845, and the 1 Will. 4, c. 36, s. 15, r. 5, require a defendant in prison under attachment for not answering to be brought up within thirty days, or he may be discharged without costs; but if he does not put in his answer within eight days a new attachment may issue. The act referred to allows the plaintiff the first four days of the ensuing term when the last day happens out of term; but the case of *Clark* v. *Clark* (1 Phil. 116; 4 Beav. 497), which decides that the defendant may be brought to the private residence of the judge during vacation, may render this provision immaterial in many cases. It need not be a seal day. (*Needham* v. *Needham*, 1 Phil. 649; 10 Jur. 81.) But see the case of *Wroe* v. *Clayton*, above cited, when the defendant is attached for *non-payment of costs*. The above rule 5, and the 13th rule of the same section, regard different subject matters, and are to be applied independently of each other. (*Lewis* v. *Edwards*, *Lewis* v. *Evans*, 5 Jur. 546.)

The rules 6, 7, 8 and 9, of the 15th section of the 1 Will. 4,

c. 36, and the 75th of the same Orders, provide assistance to a defendant brought up on attachment for want of answer, to enable him to put in an answer when prevented by poverty from so doing. See cases cited with reference to these provisions, infra, p. 542.

When the sheriff returns *non est inventus* to an attachment for want of answer, see "*Serjeant-at-Arms*," and "*Sequestration.*"

An attachment issues for *non-obedience of an order or decree* after due service. (11th G. O., April, 1842.) But see 88th G. O., 8th May, 1845, restraining any proceedings from being taken or the issuing of any process to compel performance of a decree founded upon a bill taken *pro confesso*, without leave of the court, to be obtained on motion, with notice served on the defendant or his solicitor, unless the court dispenses with such service. In the case of *Brown* v. *Home* (10 Beav. 400), where, after the decree had been served, the defendant could not be found, the court gave leave to the plaintiff to issue and execute such process of contempt as he might be advised, to compel performance of the decree.

An attachment also issues in England upon an order made under the Incumbered Estates Act (Ireland), that a man and his wife should pay a sum of money or stand committed, the parties coming to England to evade obedience to the order, which must, however, be enrolled in Chancery here; the process will go against the husband. (*Re Keogh's Estate*, 23 L. T. 73.)

The court is not very liberal with parties issuing process of contempt, as will be seen by the allowances made for attachments, when issued, being totally inadequate to reimburse the party issuing it. The costs of an attachment issued, but not executed, are fixed at 11*s.* 2*d.*, and if executed, 13*s.* 8*d.* (*Brown* v. *Lee*, 11 Beav. 379); but if against more than one defendant, then 2*s.* 6*d.* more for each additional defendant. The stamp, which must be impressed on the writ

before it can be sealed, is 8*s.*, and the writ itself has to be purchased ready stamped, the stationer always charging his profit on the outlay for the stamp, as well as the form. There is not, therefore, a single 6*s.* 8*d.* for the attendance of the solicitor allowed; and if the writ is executed it is even worse, for the trouble and expenses are greatly increased, whilst the practice of the court adds only 2*s.* 6*d.* to the small sum of 11*s.* 2*d.*, to compensate the party, who must, of necessity, be a loser by the process.

In other cases than those above mentioned, the costs of contempt are taxed costs, and not fixed sums. (*Wilkin* v. *Nainby*, 10 Jur. 735.) The plaintiff will lose his costs unless he gets them paid before the defendant is released from custody, or if he accepts the defendant's appearance or answer, or takes a step in the cause before they are paid, such being held a waiver of costs, and the defendant will be entitled to his discharge. (*Landars* v. *Allen*, 6 Sim. 619; *Oldfield* v. *Cobbett*, 1 Phil. 557; 9 Jur. 931; *Haynes* v. *Ball*, 5 Beav. 140.) Costs of contempt are not allowed in the taxation of costs as between party and party. (*Attorney-General* v. *Carrington*, 6 Beav. 454.) When a defendant in contempt filed his plea, and then obtained the usual order for his discharge on payment or tender of costs, but did not pay or tender them, the court ordered the plea to be taken off the file. (*Wilkin* v. *Nainby*, 10 Jur. 735.) A defendant obtaining an order to defend *in formâ pauperis*, after being committed for contempt, must pay the costs of the contempt before he can claim his discharge under 1 Will. 4, c. 36, s. 15, r. 17, although he has put in his answer, for the want of which he was committed, and such costs will not be ordered to be costs in the cause. (*Allibone* v. *Jones*, 13 L. J. 408; *Read* v. *Pike*, 8 Jur. 678).

If a defendant, while in contempt for want of answer, files an answer, and obtains an order to clear the contempt on payment of the costs, but after taxation they remain unpaid, the plaintiff is entitled to have the answer taken off

the file. (*Coyle* v. *Alleyne*, 22 L. J. 937.) The time for excepting to the defendant's answer runs from the filing of the answer, and not from the time when the costs of the contempt are paid. (Ibid., 16 Beav. 548.)

DISTRINGAS AGAINST A CORPORATION.

Instead of an attachment, a distringas issues against a corporation. If it be for want of answer, an affidavit of delivery of interrogatories must be produced, but no order is necessary. The following is the form of distringas:

Form of Distringas against a Corporation.

VICTORIA, &c.

To the Sheriff of —— [*or, as the case may be*], greeting.

We command you to make a distress upon all the lands and tenements, goods and chattels of —— within your bailiwick, so as neither they the said ——, nor any other person or persons for them, may lay his or their hands thereon until our Court of Chancery shall make other order to the contrary; and in the mean time you are to answer to us for the said goods and chattels, rents and profits of the said lands, so that the said —— may be compelled to appear before us in our said Court of Chancery, wheresoever it shall then be, there to answer to us as well touching a contempt which they, as it is alleged, have committed against us, as also such other matters as shall be then and there laid to their charge, and further to perform and abide such order as our said court shall make in this behalf; and hereof fail not, and bring this writ with you.

Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

ROMILLY, M. R.

The directions, returns and indorsements are the same as to a writ of attachment, and a præcipe is required on presenting this writ to the record and writ clerk to be sealed, previously to which, however, it should be entered in the Registrar's Office, in like manner as an attachment. The distringas is followed by an alias and then a pluries distringas, on the return of which latter a sequestration issues on motion of course. The distringas, like other writs, is prepared by the solicitor or party, and it must bear an 8*s.* stamp,

if for want of answer, and so when it was issued for want of appearance, but which is not now necessary, since the facilities afforded to a plaintiff by the Orders of May, 1845, to enter an appearance for a defendant. But it would seem that if the distringas lie for any other purpose a 20*s.* stamp is necessary. (G. O., 25th Oct. 1852.)

For directions as to a distringas to prevent the sale or transfer of stock and dividends at the Bank of England, see infra.

SERJEANT-AT-ARMS.

The plaintiff or party prosecuting is entitled to an order for the serjeant-at-arms, when the messenger of the court cannot find the defendant upon the return of that officer to that effect. (*Sambroke* v. *Ekins*, Dick. 68.) The plaintiff is also entitled to an order for the serjeant-at-arms, if the sheriff returns *non est inventus* to an attachment for want of answer. (1 Will. 4, c. 36, s. 15, r. 1.) But see the 9th Order of August, 1841, whereby, upon the return *non est inventus* to an attachment for want of answer, the plaintiff is entitled, on the affidavit required by the above-mentioned rule 1, to a writ of sequestration. The decisions on the rule being therefore applicable to the Order just referred to, they are noticed as follows.

The affidavit must be made by the clerk who issued the attachment, and the town agent, if any, must join, swearing as to belief (*Handfield* v. *Woolley*, 4 Sim. 122); and it must state the deponent's belief that at the time of issuing the attachment, the defendant was in the county into which it was issued, and not merely that his last known place of residence was in that county (*Handfield* v. *Wildes*, 2 Russ. & Myl. 91); and must swear to facts satisfying the court that due diligence has been used to ascertain the place where the defendant was at the time of issuing the writ, and in endeavouring to apprehend him. (*Wright* v. *Green*, 2 Russ. & Myl. 93.) It is not sufficient to show that due diligence had been used to discover the defendant's *residence*,

and not the *place where he was at the time of issuing the writ*, as the words of the act should be followed (*Davis* v. *Hammond*, 5 Sim. 9); nor is it sufficient to read an affidavit of the town agent showing that he issued the writ, and of the sheriff's officer showing the steps taken by him to apprehend the defendant, and the manner in which his endeavours were eluded, for there must be the affidavit of the solicitor, or his town agent, as to due diligence in endeavouring to apprehend the defendant, the words of the act requiring this. (*Pugh* v. *Pugh*, 2 Myl. & K. 358; and see *Nelthorpe* v. *Wright*, 2 Keen, 253.) Where a defendant files an insufficient answer, and gets an order for clearing his contempt on payment of costs, after the serjeant-at-arms against him has returned *non est inventus*, the plaintiff is entitled to resume his process at the point where he was stopped by the order obtained by the defendant; and a sequestration for want of answer to the exceptions sued out immediately on the defendant's submitting to answer them, and an order to take the bill pro confesso, were held regular. (*Taylor* v. *Salmon*, 3 Myl. & Cr. 109.) This decision accords with the 24th General Order of 23rd November, 1831, and by which it will be seen that the plaintiff is in the same position if the plaintiff accepts the costs without order.

The *attachment with proclamations* and the *writ of rebellion*, formerly in use in certain cases, *are abolished* by the 6th General Order of 26th August, 1841. There is nothing therefore but what has been already noticed between the original attachment and the serjeant-at-arms, although, as afterwards shown, a commission of sequestration may sometimes issue on the return of an attachment, and the bill may also be taken *pro confesso* without the intervention of the serjeant-at-arms, and without a sequestration.

No order is hereafter to be made for the serjeant-at-arms to take the body of a defendant for the purpose of compelling him to appear to a bill. (7th G. O., Aug. 1841.)

The motion for the serjeant-at-arms is of course, the attachment being returned, and when completed and handed

to that officer, he will proceed to execute it, and if he takes the defendant, bring him into court, when the plaintiff instructs his counsel to move that he may be turned over to the Queen's Prison. This must be done within ten days after the defendant is taken, or if the last of such ten days happens in the vacation, then within the first four days of the ensuing term; otherwise the defendant may be discharged without costs, which in that case are to be paid by the plaintiff. (1 Will. 4, c. 36, s. 15, r. 5; 73rd G. O., May, 1845.)

The order just referred to, which relates only to the case of an arrest for want of answer, does not mention the four days of the next term, but is confined to the ten days after the arrest, whilst the section of the act referred to provides for this taking place during vacation.

The same order provides, that if such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him for want of answer.

If the defendant is already in custody, and the serjeant-at-arms lodges a detainer against him, he returns to that effect, and the plaintiff must then have the defendant brought up by habeas corpus and turned over to the Queen's Prison.

If the defendant escape from the custody of the serjeant-at-arms, a second order for the serjeant-at-arms must be obtained. (*Morris* v. *Smith*, 8 Sim. 33.)

SEQUESTRATION.

The commission of sequestration issues upon order obtained for that purpose, and empowers the commissioners therein named to sequester the rents of the defendant's real estates and his personal estate, and keep the same until his contempt is cleared. When it issues after the serjeant-at-arms has been called into requisition, that officer's return must be filed, and upon the office copy of that return the

motion, which is of course, is founded. (See *Floyd* v. *Nangle*, 3 Atk. 569.) But in some cases a sequestration issues without the intervention of the serjeant-at-arms.

Form of Commission of Sequestration.

VICTORIA, &c.

To [*commissioners names*], greeting.

Whereas A. B., complainant, exhibited his bill of complaint into our Court of Chancery against C. D., defendant; and whereas the said C. D. being duly served with a writ issuing out of our said court, commanding him under the penalty therein mentioned to appear to and answer the said bill, hath refused so to do, and thereupon process of contempt hath issued against him unto a serjeant-at-arms; and whereas the said C. D. hath of late absconded and so concealed himself that the said serjeant-at-arms hath not been able to find him, as by the certificate of the said serjeant-at-arms appears: Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give unto you or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said C. D., and to collect, receive and sequester into your hands, not only all the rents and profits of his said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours go to and enter upon all the messuages, lands, tenements and real estate of the said C. D., and that you do collect, take and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall fully answer the complainant's bill, clear his contempt, and our said court make other order to the contrary.

Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

ROMILLY, M. R.

Indorsement.

Commission of Sequestration.

A. B. *v.* C. D.

[*Name and address of plaintiff's solicitor and agent, if any.*]

The foregoing is for want of answer upon the return of the serjeant-at-arms; but as the writ issues for other purposes, it must be varied according to circumstances, the

order under which it issues being the guide. The præcipe is as follows:—

A. B. v. C. D. } Seal a commission of sequestration against C. D. for not [*as the case may be*] ats. A. B. directed to [*commissioners' names*], commissioners.

Order, dated —— day of ——, 1854.
Tested —— day of ——, 1854.

[*Name and address of solicitor and agent, if any.*]

The draft of the writ may, before engrossment, be shown to the record and writ clerk, if any difficulty is felt as to the precise form.

By the 9th General Order of the 26th August, 1841, the plaintiff is entitled to this writ on a return of *non est inventus* to an attachment for want of answer. (See that order, and the affidavit thereby required to ground the writ.) Also, by the 11th General Order of April, 1842, when an attachment is issued for non-performance of a decree or order, upon the sheriff's return *non est inventus* to the attachment, the party prosecuting the order or decree is entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he had theretofore been entitled to upon a return non est inventus made by the commissioners named in a commission of rebellion (now abolished) issued for the non-performance of an order or decree.

Where a defendant files an insufficient answer and gets an order for clearing his contempt on payment of costs, after the serjeant-at-arms against him has returned *non est inventus*, the plaintiff is entitled to resume his process at the point where he was stopped by that order; and a sequestration for want of answer to the exceptions, sued out immediately after the defendant submitted to answer them, and a subsequent order to take the bill pro confesso, were held regular (*Taylor* v. *Salmon*, 3 Myl. & Cr. 109): but where the serjeant-at-arms, having taken the defendant, suffered him to

escape, upon the plaintiff moving for a sequestration, the court required that there should be a second order for the serjeant-at-arms. (*Morris* v. *Smith*, 8 Sim. 33.)

The solicitor or party prepares the writ, which must be impressed with a 20*s.* Chancery stamp, and the record and writ clerk seals it on production of a precipe and the order authorizing it to issue.

It is not the practice to file a return to a writ of sequestration (*Goldsmith* v. *Goldsmith*, 10 Jur. 561); where also the use of, and propriety of executing, a writ of sequestration is considered by Vice-Chancellor Wigram.

The Vice-Chancellor Stuart observed, with regard to the writ of sequestration, that the proceedings upon it are in rem, and not in personam, as is the case with an attachment; therefore, where a defendant against whom a sequestration had issued for non-payment of money into court obtained his discharge under the Insolvent Debtors' Act, a petition by his assignees to discharge the sequestration and for delivery up of the estates, was dismissed. (*Tatham* v. *Parker*, 17 Jur. 929.)

The party prosecuting any contempt may, without order, sue forth the several writs in process of contempt, *returnable immediately*, in case the party in contempt resides or is in London, or within twenty miles thereof, and in other cases, returnable in vacation, so that there be fifteen clear days between the teste and return of each of such writs. (1 Will. 4, c. 36, s. 15, r. 3.)

A sequestration issues also against *a peer, a member of the House of Commons, and a corporation.* With the sequestration formerly issued against defendants of these classes for not appearing, we need not now occupy ourselves, as the General Orders of May, 1845, enable a plaintiff to enter an appearance for a defendant by default after due service, but it may still be required for want of answer, in which case a sequestration nisi for want of answer will be ordered on motion of course made upon affidavit of de-

livery of interrogatories, and the certificate of the record and writ clerk that no answer is filed. The order should be served personally on the defendant, and if no cause is shown within the eight days after service, the court will as of course upon motion, supported by an affidavit of service and the registrar's certificate of no cause shown, make the sequestration absolute.

A sequestration issues also against *a corporation* upon the returns of a distringas, an alias and a pluries distringas.

When a person shall be committed for a contempt in *not delivering* to any person or persons, or depositing in court or elsewhere, as by any order may be directed, *books, papers or any other articles or things*, any sequestrator or sequestrators appointed under any commission of sequestration shall have the same power to seize and take such books, papers, writings or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would have over his own property; and thereupon such articles or things so seized or taken shall be dealt with by the court as shall be just, and after such seizure it may, upon the application of the prisoner or of any other person in the cause or matter, or upon any report to be made in pursuance of this act, make such order for the discharge of the prisoner upon such terms, and, if it shall see fit, making any costs in the cause as to the court shall seem proper. (1 Will. 4, c. 36, s. 15, r. 16.)

The 17th and 18th rules of the same section also give a general power to the court to discharge prisoners committed for contempt upon such terms, and making costs, costs in the cause as it shall think proper.

The discharge of any prisoner under the Insolvent Debtors' Act extends to process for contempt in not paying money, and to costs of contempt and otherwise. (16 & 17 ibid.)

The 17th section applies, in common with the 16th, to proceedings in the Insolvent Debtors' Court. (*Read* v. *Pike*, 8 Jur. 678; *Allibone* v. *Jones*, 13 L. J. 408.)

When a bill has been ordered to be taken *pro confesso*, the court may, under the 84th General Order, 8th May, 1845, in pronouncing the decree on the hearing of the cause, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant, or direct a sequestration to issue. See infra, pp. 544, 545, as to this and when possession may be taken.

Taking Bill Pro Confesso.

The provisions for taking a bill *pro confesso* may be stated under the following heads:—

FOR WANT OF APPEARANCE.

The act 1 Will. 4, c. 36, ss. 3, 15, r. 13, contains the powers enabling a plaintiff to take the bill *pro confesso* against a defendant refusing or neglecting to appear; but as the General Orders of May, 1845, afford great facilities to a plaintiff for entering an appearance for a defendant, an application to take a bill *pro confesso* for want of appearance would not meet with much favour at the hands of the court, and it may be assumed would not be granted, that proceeding being one of the utmost extremity, and the remedy in the case of an appearance being under the present practice in the plaintiff's own hands. (See facilities afforded to a plaintiff to appear for a defendant, ante, page 20.)

We may therefore consider that the cases in which applications to take the bill *pro confesso* may be made are the following only:—

FOR WANT OF ANSWER.

The plaintiff may move for an order to take the bill *pro*

confesso against any particular defendant or defendants at the following stages:—

1. *On return of habeas corpus* after defendant is committed or remanded back to prison. (1 Will. 4, c. 36, s. 15, r. 2.)

This rule is as follows:—

That if any defendant, being in contempt for not answering the bill, shall have been brought to the bar of the court under process for such contempt, and shall have been committed or remanded back to the prison of the Fleet, the plaintiff may sue forth the writ of habeas corpus in the manner and form heretofore in use in the like cases, provided that there shall be at least twenty-eight days between the day on which such defendant was so committed or remanded back and the return of such writ of habeas corpus; and upon or after the return of such writ of habeas corpus, in case such defendant shall not have put in his answer, the court shall order the bill to be taken pro confesso against such defendant, in the same manner as is now usual in the like cases upon the return of a writ of alias pluries habeas corpus, and such decree shall thereupon be made as shall be thought just; but in regard to any defendant in custody before and at the time of the passing of this act, there shall be at least thirty days between the time of passing this act and the return of such last-mentioned writ of habeas corpus; and it shall not be necessary in the case of any defendant now in custody as aforesaid, who shall have been brought to the bar of the court as aforesaid, to sue forth more than one writ of habeas corpus in order to take the bill pro confesso. (Ibid.)

A defendant in contempt was brought up from the Queen's Bench Prison under rule 6 of the above section, and turned over to the Fleet, and a counsel and solicitor were assigned him; but he did not put in his answer. The court held that the bill could not be taken pro confesso under the above rule

2, until the defendant had been again brought up and remanded. (*Viscountess Barnewell* v. *Cooke*, 7 Sim. 320.)

A second habeas corpus is necessary when the defendant is attached and taken to prison. (*Bilton* v. *Bennett et ux.*, 4 Sim. 17.)

It was immaterial before the General Orders of May, 1845, whether the defendant was served within or without the jurisdiction. (*Godson* v. *Cook*, 7 Sim. 519.) And those orders have confirmed that practice.

The court refused to interfere to the prejudice of the plaintiff's proceedings, by ordering a defendant to answer separately from his wife and for his discharge, although his affidavit stated he had no control over his wife. (*Gee* v. *Cottle*, 3 Myl. & Cr. 180.)

The twenty-eight days mentioned in the above rule 2 are not extended by the 13th rule of the same act, and the plaintiff need not wait the two months reckoned in the 13th rule before bringing up defendant to take the bill pro confesso. (*Simpson* v. *Barton*, 13 L. J. 79.) The bill may under the act be taken pro confesso in vacation. (*Simmons* v. *Wood*, 2 Hare, 644.)

When the first habeas is rendered unavailable, and from any cause the hearing is postponed to a future day, a new writ issues for that day, if the court shall so direct, without fee. (G. O., 31st Jan. 1846.)

The return to the writ of habeas corpus when disposed of should be left with the record and writ clerk. (*Oldfield* v. *Cobbett*, 2 Phill. 289.)

2. *On return of habeas corpus* where defendant is confined for misdemeanor. (1 Will. 4, c. 36, s. 15, r. 4.)

This rule is as follows:—

That where a defendant is confined for a misdemeanor, and has been brought before the court upon an habeas corpus, and thereupon has been turned over to the Fleet pro formâ, but has been carried back to the prison from whence

he came, with his cause, another writ of habeas corpus may issue, directed to the gaoler or keeper of the prison to which he has been carried back, and thereupon the defendant shall be brought into court, and remanded to the prison from whence he came, with his cause, without being turned over again to the Fleet Prison, and the bill may be taken pro confesso, in the same manner in all respects as if the defendant had been all along in the custody of the warden of the Fleet. (Ibid.)

In this case the mode of proceeding may perhaps be more conveniently exchanged for that pointed out by the 4th division of this subject, page 536.

3. *On defendant neglecting to answer within two months after taken into or detained in custody* for contempt in not answering; and the plaintiff *must* obtain an order to take the bill pro confesso within *six weeks* after the period, computed from the expiration of such two calendar months within which he may be able to take the same pro confesso, otherwise the defendant is entitled to his discharge. (1 Will. 4, c. 36, s. 15, r. 13.)

The rule is as follows:—

That where the defendant is in contempt for not appearing or not answering, and in actual custody under process for such contempt, or being already in custody shall be detained by an attachment for such contempt, and shall not, where the contempt is for not appearing, enter an appearance within twenty-one days after he is lodged in gaol or prison, or the attachment is lodged against him (he being already in prison), as the case may be, or, where the contempt is for not answering, put in an answer within two calendar months after he is lodged in gaol or prison, or the attachment is lodged against him, he being already in prison, the plaintiff shall (as the case may be), within fourteen days after the period computed from the expiration of such twenty-one days within which he may by the provisions of this act be

able to enter such appearance, cause an appearance to be entered for the defendant under the powers of this act, and shall at the expiration of such two calendar months proceed to take the bill pro confesso, and shall accordingly obtain an order for taking the same pro confesso within six weeks after the period computed from the expiration of such two calendar months within which he may be able to take the same pro confesso; or in default of so doing in either of such cases, the defendant shall, upon application to the court, be entitled to be discharged out of custody without paying any of the costs of the contempt, unless the court shall, under the power hereinbefore contained, see good cause to remand and detain the defendant in custody; and this rule shall apply to every defendant in custody before and at the time of the passing of this act, who shall not have entered his appearance, and for whom an appearance shall not have been entered, or shall not have answered the bill, and the bill shall not have been taken pro confesso, but the twenty-one days and two calendar months respectively to be reckoned from the first day of next term, and the other periods to be altered accordingly in computation; but nothing in this act shall prevent any plaintiff from proceeding to take his bill pro confesso, according to the practice existing before the passing of this act, where at the time of passing of this act his proceedings shall be so far advanced that the powers of this act would not enable him to accelerate the period for taking his bill pro confesso. (Ibid.)

This rule and the fifth of the same section regard different subject-matters, and are to be applied independently of each other. (*Lewis* v. *Edwards*, *Lewis* v. *Evans*, 5 Jur. 546.) Where the defendant applied for and obtained time to put in his answer, and during such time the six weeks mentioned in the above-mentioned rule expired, it was held that the defendant was not entitled to his discharge. (*Woodward* v. *Conebeer*, 2 Hare, 506.) The six weeks are not reckoned pending a reference to inquire whether defendant is a pauper.

(*Bates* v. *Frost*, 9 Jur. 291.) But the two months and the six weeks will run during vacation. (*Simmons* v. *Wood*, 2 Hare, 644.)

4. *On execution of attachment for want of answer, or within three weeks afterwards.* (49th Art. of 16th, and 76th G. O., 8th May, 1845.)

These orders are as follows:—

At any time within three weeks after the execution of an attachment for want of answer, the plaintiff may serve a defendant so attached with a notice of motion that the bill may be taken pro confesso against him, and may move the court accordingly, as directed by Order 76. (49th Art. of 16th G. O., 8th May, 1845.)

Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the plaintiff may cause such defendant to be served with a notice of motion to be made on some day not less than three weeks after the day of such service, that the bill may be taken pro confesso against such defendant; and thereupon, unless such defendant has in the meantime put in his answer to the bill or obtained further time to answer the same, the court, if it so thinks fit, may order the bill to be taken pro confesso against such defendant, either immediately, or at such time, and upon such terms, and subject to such conditions, as, under the circumstances of the case, the court thinks proper. (76th G. O., 8th May, 1845.)

The 76th Order is not compulsory, but plaintiff may, if he prefers it, proceed under the statute 1 Will. 4, c. 36. (*Wilkin* v. *Nainby*, 10 Jur. 735.) And when the plaintiff has a right to take the bill pro confesso against a husband whose wife is also a defendant, and there is no order for her to answer separately, the order should be to take the bill pro confesso against both. (*Alexander* v. *Osborne*, 16 L. J. 368; 11 Jur. 444.) Where a notice of motion was served under the 76th Order, but the defendant put in his answer before

the motion was made, the plaintiff was held to be right in bringing it on to obtain the costs of it, which were given accordingly. (*Spooner* v. *Payne*, 17 L. J. 130; 12 Jur. 642.)

5. *When defendant*, whether within or without the jurisdiction, *is deemed to have absconded*, the plaintiff being unable to procure an attachment or any subsequent process for want of answer to be executed (77th and 78th G. O., May, 1845, if defendant has appeared in person or by solicitor), and (79th ibid, if an appearance has been entered for him at the plaintiff's instance).

These orders are as follows:—

In cases where any defendant, either being or not being within the jurisdiction of the court, does not put in his answer in due time after appearance entered by or for him, and the plaintiff is unable, with due diligence, to procure a writ of attachment or any subsequent process for want of answer to be executed against such defendant, by reason of his being out of the jurisdiction of the court, or being concealed, or for any other cause, then such defendant is, for the purpose of enabling the plaintiff to obtain an order to take the bill pro confesso, to be deemed to have absconded to avoid, or to have refused to obey the process of the court. (77th G. O., 8th May, 1845.)

In cases where any defendant who, under Order 77, may be deemed to have absconded to avoid, or to have refused to obey the process of the court, has appeared in person or by his own solicitor, the plaintiff may serve upon such defendant or his solicitor a notice, that on a day in such notice named (being not less than fourteen days after the service of such notice) the court will be moved that the bill may be taken pro confesso against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the court, that such defendant ought, under the provisions of Order 77, to be deemed to have absconded to avoid, or to

have refused to obey the process of the court; and the court being so satisfied and the answer not being filed, may, if it so thinks fit, order the bill to be taken pro confesso against such defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the court may think proper. (78th ibid.)

In cases where any defendant, who, under Order 77, may be deemed to have absconded to avoid, or to have refused to obey the process of the court, has had an appearance entered for him, under Orders 29, 31 or 33, and has not afterwards appeared in person or by his own solicitor, the plaintiff may cause to be inserted in the London Gazette a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the London Gazette) the court will be moved that the bill may be taken pro confesso against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the court, that such defendant ought, under the provisions of Order 77, to be deemed to have absconded to avoid, or to have refused to obey the process of the court, and that such notice of motion has been inserted in the London Gazette, at least once in every week from the time of the first insertion thereof up to the time for which the said notice is given; and the court, being so satisfied and the answer not having been filed, may, if it so thinks fit, order the bill to be taken pro confesso against such defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the court may think proper. (79th ibid.)

The defendant will be deemed to have absconded if he was residing out of the jurisdiction when the bill was filed, and has not since been within the jurisdiction. (*Hele* v. *Ogle*, 2 Hare, 623.) In order to satisfy the court that the defendant should be deemed to have absconded, the affidavit must distinctly show the means which the deponent has of knowing the party and the facts to which he deposes. (*Harrison* v. *Stewardson*, 2 Hare, 534; and see *Courage* v.

Wardell, 9 Jur. 1055, where the evidence not being sufficiently positive, the court would only make an order nisi.) There should be an affidavit of the officer, showing that he has exercised due diligence to execute the attachment. (*Yearsley* v. *Budgett*, 11 Beav. 144.) But see also *Whitfield* v. *Lequeutre*, 10 Jur. 533, where an affidavit of the clerk to the plaintiff's solicitor was received, and the court did not require the sheriff's return to the attachment. The proof as to defendant having absconded must not be postponed until the motion to take the bill pro confesso be made. (Ibid.) See also *Clarke* v. *Clarke*, 11 Jur. 705, where the bill was ordered to be taken pro confesso on a day named, without prejudice to any application the defendant might make in the meantime; and *Lethbridge* v. *Charter*, 13 Jur. 114, where the filing of a cross bill by the defendant, who had gone to his regiment in India, was considered to have made the case worse against him.

6. *When defendant is in custody* for want of answer, *and, submitting to have the bill taken pro confesso against him, moves,* on notice to plaintiff, *to be discharged,* the court may order the bill to be taken pro confesso, and defendant to be discharged upon such terms as appear just, unless it appears to the court that discovery is necessary. (80th G. O., May, 1845.)

This order is as follows:—

Any defendant being in custody for want of his answer, and submitting to have the bill taken pro confesso against him, may apply to the court, upon motion with notice to be served on the plaintiff, to be discharged out of custody; and thereupon the court may order the bill to be taken pro confesso against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears, from the nature of the plaintiff's case or otherwise, to the satisfaction of the court, that justice cannot

be done to the plaintiff without discovery or further discovery from such defendant. (80th ibid.)

7. *When an order for a sequestration has been made,* plaintiff may at once proceed to take the bill pro confesso. The writ of sequestration need not in this case be actually issued, the order for it being sufficient, when the bill is intended to be taken pro confesso.

8. *When defendant having privilege of parliament refuses to answer within the time allowed by the rules and orders of the court,* plaintiff may obtain an order that the bill be taken pro confesso, unless defendant, within eight days after being served with the order, show good cause to the contrary. (1 Will. 4, c. 36, s. 13.)

This section is as follows:—

That from and after the passing of this act, when any defendant having privilege of parliament shall have appeared to any bill filed against him seeking a discovery upon oath, or when an appearance shall have been entered for such defendant according to the provisions aforesaid, and such person shall refuse or neglect to put in his answer to such bill within the time for that purpose allowed by the rules and orders of such court, that then it shall and may be lawful for the plaintiff in such suit to apply to the court for an order that such bill shall be taken pro confesso against such defendant, and upon such application such court of equity shall make an order that such bill shall be taken pro confesso, unless the defendant shall within eight days after being served with such order show good cause to the contrary. (Ibid.)

The plaintiff *may obtain an order to amend his bill,* on notice to defendant personally, without affecting his process of contempt, where the defendant has been before the court

for contempt in not answering, and refuses or neglects to answer. (1 Will. 4, c. 36, s. 15, r. 10.)

And *after an answer has been put in, and the bill is afterwards amended*, and the defendant fails to answer the amended bill, it may be taken pro confesso generally and not as to the amendments only. (*Jopling* v. *Stuart*, 4 Ves. 619.) But if an order to amend be obtained after an order to take the bill pro confesso, the last-mentioned order is gone. (*Weightman* v. *Powell*, 18 L. J. 71; 12 Jur. 958.)

Every bill taken pro confesso, or an examined copy, may be given in evidence, as if the defendant had admitted such facts and circumstances as the answer, if put in, would have been evidence of. (1 Will. 4, c. 36, s. 14.)

As to the course of proceeding for taking a bill pro confesso *against a corporation*, see *Brickwood* v. *Harvey*, 8 Sim. 201.)

Where the *Attorney-General had not put in his answer within a reasonable time*, the court ordered that he should do so within a week after service of the order, or that the bill should be taken pro confesso against him. (*Groom* v. *Attorney-General*, 9 Sim. 325.

A bill may be taken pro confesso *notwithstanding the filing of an insufficient answer*. (*Turner* v. *Turner*, 1 Dick. 316. See also *Taylor* v. *Salmon*, 8 Sim. 450, and *Jopling* v. *Stuart*, 4 Ves. 619.)

The order for taking the bill pro confesso *takes effect from the time when it is pronounced*, and the court would not discharge the order when the answer was filed before the rising of the court on the day on which the order was made. (*James* v. *Creswiche*, 7 Sim. 143. See also *Taylor* v. *Salmon*, 8 Sim. 450, where the answer was ordered to be taken off the file.)

If the defendant, *through poverty, idiotcy or lunacy, &c.*, cannot employ a solicitor to put in an answer, the court will assist him by assigning him a counsel and solicitor. (See

1 Will. 4, c. 36, s. 15, rules 6, 7, 8 and 9, and 75th G. O., May, 1845.)

The same order that assigns a counsel and solicitor to the defendant may direct a writ of habeas corpus to issue and the record to be produced at the return of the writ, in order that the bill may be taken pro confesso, unless the answer is put in in the meantime. (*Welford* v. *Daniell*, 9 Sim. 652.) Where a defendant deposed that she was unable, through poverty, to employ a solicitor, and the usual reference to the master was made, and she then refused to make any statement to the master, the court ordered proceedings to be taken for taking the bill pro confesso, under 1 Will. 4, c. 36, s. 15, r. 2. (*Williams* v. *Parkinson*, 5 Sim. 74; and see *Bull* v. *Falkner*, 11 Jur. 235.) The 7th rule of the same section, providing for the assignment of a counsel and solicitor to a defendant, and payment of the costs of contempt out of the Suitors' Fund, &c., was intended for the benefit of defendants, and the Court refused to act under it at the instance of the plaintiff. (*Watkins* v. *Parker*, 1 Myl. & Cr. 370.)

The court will not order a bill to be taken pro confesso against a defendant who has *always been resident abroad*, he not having absconded, and there not appearing to be any refusal to obey the order of the court. (*Zulueta* v. *Vinent*, 15 Beav. 272; see also *Boschetti* v. *Power*, 8 Beav. 180, as to issuing an attachment against a defendant residing abroad.)

A cause may be advanced for the purpose of taking the bill pro confesso (*Barwick* v. *Ward*, 5 Sim. 676); and if struck out by reason of the absence of counsel, may be restored on the application of the plaintiff alone. (*Harvey* v. *Renon*, 12 Jur. 445.)

Where a party had lent money on a promissory note at 6*l.* per cent., having a deposit of deeds relating to land as a collateral security, and a verbal agreement for a legal mortgage, and the borrower had left his home without having executed the mortgage, and the lender filed a bill for fore-

closure or sale, and moved to have the bill taken pro confesso, the court held him not entitled to the aid of the court in creating a legal mortgage, that it would refuse the motion and dismiss the bill. (*James* v. *Rice*, 22 L. T. 218.)

The court will not order a claim to be taken pro confesso against an absconding defendant, although the proceedings prescribed by the 1 Will. 4, c. 36, s. 3, for taking bills pro confesso, have been strictly followed. (*Henderson* v. *Thomas*, 10 Hare, App., 67.)

The Hearing of a Cause in which the Bill has been ordered to be taken Pro Confesso, and the Decree thereon.

No cause in which an order is made that a bill be taken pro confesso against a defendant is to be heard on the same day on which the order is made; but the cause is to be set down to be heard, and the court, if it so thinks fit, may appoint a special day for the hearing thereof. (81st G. O., 8th May, 1845.) The order here mentioned is the preliminary order for the clerk of records and writs to attend with the record with a view to the bill being taken pro confesso, the practice being thereby rendered uniform whether there is one defendant or whether there are several. (*Brown* v. *Home*, 8 Beav. 607; 16 L. J. 177.)

A defendant against whom an order to take a bill pro confesso is made is at liberty to appear at the hearing of a cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill. (82nd G. O., 8th May, 1845.)

Upon the hearing of a cause in which a bill has been ordered to be taken pro confesso, such decree is to be made as to the court seems just; and in the case of any defendant who has appeared at the hearing, and waived all objection to such order to take the bill pro confesso, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on or after the execution

of a writ of attachment against him, the decree is to be absolute. (83rd ibid.)

In pronouncing the decree, the court may either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order *a receiver* of the real and personal estate of the defendant against whom the bill has been ordered to be taken *pro confesso* to be appointed, with the usual directions, or direct a *sequestration* of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real or personal estate of such sum or sums of money as at the hearing or any subsequent stage of the cause the plaintiff appears to be entitled to; provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the court afterwards thinks fit to order restitution to be made. (84th ibid.) The court considered the plaintiff's bond sufficient security for restitution, such bond to be given to the record and writ clerk, and to be settled by the master. (*Lett* v. *Randall*, 7 Jur. 1075.)

A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees. (85th G. O., 8th May, 1845.)

Service of Copy of Decree on Defendant, and Notice as to setting it aside.

After a decree founded on a bill taken *pro confesso* has been passed and entered, *an office copy thereof is* (unless the Court dispenses with service thereof) *to be served on the defendant* against whom the order to take the bill *pro confesso* was made, *or his solicitor; and if the decree be not absolute* under Order 83, such defendant, or his solicitor, is to be at the same time served with *a notice* to the effect that if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the court within the time specified in the

notice, or that such defendant will be absolutely excluded from making any such application. (86th ibid.)

If such notice is to be served *within the jurisdiction* of the court, the time therein specified for such application to be made by the defendant is to be *three weeks after service* of such notice; but if such notice is to be served *out of the jurisdiction of the court, such time is to be specially appointed* by the court, on the ex parte application of the plaintiff. (87th ibid.) See also 1 Will. 4, c. 36, ss. 4 & 5.

Proceedings not to be taken under Decree without Leave of Court.

No proceeding is to be taken and no receiver appointed under the decree, nor any sequestrator, under any sequestration issued in pursuance thereof, is to take possession of or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the decree without leave of the court, which is to be obtained on motion, with notice served on such defendant, or his solicitor, unless the court dispenses with such service. (88th ibid.) The notice here required appears not to apply to proceedings for appointing a receiver, but to his taking possession of the estates when appointed. (*Dresser* v. *Morton*, 2 Phil. 285.) Where, after the decree had been served, the defendant could not be found, leave was given to the plaintiff to issue and execute such process of contempt as he might be advised, to compel performance of the decree. (*Brown* v. *Home*, 10 Beav. 400.)

Rehearing of Cause.

Any defendant waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the court may direct, may, before enrolment of the decree, have the cause reheard upon the merits stated in the bill, the petition for rehearing being signed by counsel as other petitions

for rehearing. (89th G. O., 8th May, 1845.) See also 1 Will. 4, c. 36, ss. 6, 7 and 8, as to rehearing a cause after a decree made upon bill taken *pro confesso*, pronounced whilst defendant is out of the realm or absconding; but the provisions of those sections can hardly apply now, and certainly not in the cases referred to in the 83rd of the Orders of 8th May, 1845, nor where the decree is made absolute under the 90th, 91st and 92nd of such Orders.

When Decree is or may be made Absolute.

In the case of any defendant who has appeared at the hearing and waived all objections to the order to take the bill *pro confesso*, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on or after the examination of a writ of attachment against him, the decree on the hearing is to be absolute. (83rd G. O., 8th May, 1845.)

In cases where a decree is not absolute under Order 83, the court may order the same to be made absolute on the motion of the plaintiff, made—

1. After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction;
2. After the expiration of the time limited by the notice provided for by Order 86, where the decree has been served without the jurisdiction;
3. After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof;

and such order may be made either on the first hearing of such motion, or on the expiration of any further time which the court may, on the hearing of such motion, allow to the defendant for presenting a petition for leave to answer the bill. (90th ibid.)

How Defendant may be let in to answer and defend after Decree Nisi.

When the decree is not absolute under Order 83, and has not been made absolute under Order 90, and a defendant has a case upon merits not appearing in the bill, he may apply to the court by petition, stating such case, and submitting to such terms with respect to costs and otherwise as the court may think reasonable, for leave to answer the bill; and the court being satisfied that such case is proper to be submitted to the judgment of the court, may, if it thinks fit, and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill; and if permission be given to such defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined and witnesses examined, and such proceedings had as if the decree had not been made, and no proceedings against such defendant had been had in the cause. (91st ibid.) Leave to put in an answer was given under this Order in a case where a decree had been made against the defendant on substituted service, and the terms imposed were that he should pay the plaintiff's costs of the petition and of the suit, and that he should proceed to answer forthwith. (*Inglis* v. *Campbell*, 23 L. T. 86.)

Rights and Liabilities of Plaintiffs and Defendants extend to their Representatives.

The rights and liabilities of any plaintiff or defendant under a decree made upon a bill taken *pro confesso*, extend to the representatives of any deceased plaintiff or defendant, and to any persons or person claiming under any person who was plaintiff or defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the court may, upon motion or petition, served in such manner and supported by

such evidence as under the circumstances of the case the court deems sufficient, permit any party, or the representative of any party, to file such bill or bills, or adopt such proceedings as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the rights of the parties duly ascertained and determined. (92nd ibid.)

Answer may be filed for Defendant instead of taking Bill Pro Confesso, or may be required from the Defendant.

In every case where defendant has been brought to the bar of the court, and shall not answer within the next twenty-one days, the plaintiff may, with leave of the court, on ten days' previous notice after the expiration of that time, instead of proceeding to have the bill taken *pro confesso*, put in an answer for the defendant without oath or signature, which, besides the formal parts, shall state that the defendant leaves the plaintiff to make such proof of the several matters in the bill alleged as he shall be able or be advised, and submits his interests to the court; and thereupon the suit shall proceed in the same manner as if such answer were really the answer of the defendant, with which the plaintiff was satisfied; and the costs of the contempt and of putting in such answer may be provided for in like manner as if the defendant himself had put in such answer. (1 Will. 4, c. 36, s. 15, r. 11.)

Where, upon application of the plaintiff, the court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill, or to the interrogatories from the defendant himself, the court may order the defendant to remain in custody until answer or further order, but without prejudice to the plaintiff's availing himself of any of the provisions of the act. (12th rule, ibid.) Although, in the case of *Maitland* v. *Rodger*, 14 Sim. 92; 8 Jur. 371, notice

of the motion to the defendant for this order was dispensed with, yet the Lords Justices, in a later case, considered it necessary to give such notice. (*Aveling* v. *Martin*, 17 Jur. 271 ; see also *Potts* v. *Whitmore*, 14 L. J. 327.)

GUARDIANSHIP, MAINTENANCE, AND ADVANCEMENT OF INFANTS.

The 26th section of the 15 & 16 Vict. c. 80, enacts that the chamber business may include the guardianship and maintenance of infants, if the judge shall think proper. The guardianship spoken of in the above section has reference only to the guardianship for which a petition, and in some cases a reference to the master, and another petition to confirm the master's report, was necessarily resorted to, under the system recently abolished. As to these applications for guardianship and maintenance, the change now effected will prove a great benefit to the estate having to bear the cost. A summons is taken out and supported on its return by affidavits of the facts necessary to be known to the judge, which facts will be such as were formerly contained in the petition and the master's report, or chiefly so; viz. as to guardianship, the fitness of the person proposed as guardian, and his willingness to act in that character, and that he has no interest adverse to that of the infant. Also the relatives of the infant must be disclosed, and notice should be given to all the near relatives; and as to maintenance, the evidence should show the age of the infant, and nature and amount of his fortune, and the circumstances showing the propriety of the maintenance proposed for him. If maintenance is asked for, it should be shown that the father is not of ability to maintain the infant in a manner suitable to his expectations. On the day appointed for hearing, or on any subsequent day to which the proceeding may be adjourned, the order asked for may be made. But if for any reason it be found necessary that any inquiries be made by the chief clerk before deciding the matter, the suitor will

have the satisfaction of finding that those inquiries will be very different, in point of expense, from a reference under the former system to the master, and in any case he may reckon upon a decision at the earliest possible time. The application for a guardian and maintenance may be made without a suit instituted. (*Ex parte Birchell*, 3 Atk. 812; *Re Bond*, 16 L. J. 147; 11 Jur. 114; *Ex parte Angell*, 13 Sim. 258.) In this last case the order was made on petition, asking for a reference to approve of a guardian and maintenance. It is presumed that it would now be made by summons in a similar case, unless the property is so large as to induce the judge to require a suit to be instituted. (See also the case *In re Neale*, p. 551.)

It will be necessary, in making an application without suit, to have regard to the several requirements of the General Orders relating to summonses originating proceedings. As, however, in this case and many others the summons does not commence a suit, although it originates a proceeding, the form will be as follows:

Form of Summons.

In Chancery.

In the matter of John Thomas, an infant,
or Joseph Wilson
against
William Jackson.

Let all parties concerned attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex, *or*, at No. —, —— Square, Lincoln's Inn, Middlesex], on ——, the —— day of ——, at —— of the clock in the —— noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application*].

Dated this —— day of ——, 1854.

JOHN ROMILLY, Master of the Rolls, *or*
RICHARD T. KINDERSLEY, Vice-Chancellor, *or*,
JOHN STUART, Vice-Chancellor, *or*,
WILLIAM PAGE WOOD, Vice-Chancellor.

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for

To

The following note to be added to the original summons where proceedings originate in chambers; and when the time is

altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above mentioned [*or*, at the place above mentioned, at the time mentioned in the indorsement hereon], such order will be made, and proceedings taken, as the judge may think just and expedient.

N.B.—*The Form of Summons to be obtained under section* 45 *of the act* 15 *&* 16 *Vict. c.* 86, *will be found ante.*

All particulars respecting this summons, when it originates a proceeding, will be found ante, under "*Proceedings in Suits by Summons.*"

The court will appoint a guardian of children, to act for the father during his absence abroad, although their mother be residing in this country. (*In re Thomas*, 22 L. J. 1075.) But it refused to appoint an English guardian to an infant residing with his mother in America without associating the mother in the guardianship, or to order payment of an annual sum to the English guardian without a previous communication with the mother on the subject. (*Lockwood* v. *Fenton*, 17 Jur. 127.)

The infant's uncle and aunt were appointed his guardians on petition without suit or reference, no allowance being asked. (*In re Neale*, 15 Beav. 250.)

The foregoing observations will also, for the most part, apply to the advancement in life of infants, the necessary order for which may be obtained by the like easy and inexpensive process. The summons stating the object of the application, the propriety of the course proposed must be shown by evidence, either got up for the purpose of the particular summons, or previously taken in the cause, or partly new and partly old, as the case may be, but notice should be given to the opposite parties of the intention to read any evidence.

With reference to the care taken by this court of the interests of infants, it may be observed that it regards any person who enters upon an infant's estate, as a guardian or bailiff for such infant. (*Hicks* v. *Sallett*, 22 L. T. 322.)

PRELIMINARY ACCOUNTS AND INQUIRIES.

The 5th General Order, 9th May, 1839, provides that in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the court on notice that such inquiries and accounts shall be made and taken; and that an order referring it to the master to make such inquiries, and take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants as, being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of such (if any) of the defendants as have answered the bill.

To bring this order into operation it must be clear that the accounts or inquiries would be directed at the hearing, and would be binding on the parties to the suit. (*Meinertzhagen* v. *Davis*, 10 Sim. 289.) Therefore, where the necessity for the reference depends upon a particular construction of a will, not easy of construction, it will not be ordered. (*Breeze* v. *English*, 2 Hare, 118.) And so will it be refused where the substantial equity of the plaintiff's bill is denied by the answer. (*Belcher* v. *Whitmore*, 7 Beav. 245; *Kinshela* v. *Lee*, ibid. 300), or where the matter is a proper subject for proof in the cause. (*Frost* v. *Hamilton*, 4 Beav. 33.)

DISTRINGAS TO PREVENT SALE OR TRANSFER OF STOCK, OR PAYMENT OF DIVIDENDS THEREON.

Persons claiming to be interested in any stock in the Bank of England or dividends thereon, may place a writ

of distringas upon it, and so secure notice to them of any contemplated dealing therewith. This step is usually had recourse to by mortgagees of stock, whether in possession or reversion, and other persons interested, when there is reason to fear that the stock or dividends may be improperly dealt with. This writ formerly issued out of the Court of Exchequer, but after the abolition of the equitable jurisdiction of that court, provision was made for it to issue out of the Court of Chancery, and it is now prepared by the solicitor and sealed by the record and writ clerk, upon filing the necessary affidavit and præcipe for the writ, the record and writ clerks succeeding to the duties of the patentee of the subpœna office, now abolished. The writ itself, which may be obtained at a law stationer's in the proper form, must be impressed with an 8*s.* Chancery stamp. The practice is regulated by the General Orders of the 17th November, 1841, altered as to the form of affidavit only by the General Order of the 10th December, 1841.

Any person or persons claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, may, by his or their solicitor, prepare a writ of distringas pursuant to the said act, in the form set out in the first schedule to the said act, and may present the same for sealing at the subpœna office. (1st G. O., 17th Nov. 1841.)

Upon the presentment of such writ for sealing, and on leaving with the patentee of the subpœna office an affidavit duly sworn by the person or one of the persons applying for such writ, or his solicitor, before one of the masters or masters extraordinary of this court, in the form set out at the foot of these orders, the same writ shall (in conformity with the orders of this court for issuing and sealing writs of subpœna) be forthwith sealed with the seal of the subpœna office, and such writ when sealed shall have the same force

and validity as the writ of distringas heretofore issued out of the Court of Exchequer. (2nd ibid.)

The affidavit may now be sworn before the record and writ clerk at the time of his sealing the writ, or before a commissioner for taking affidavits in Chancery.

Such writ of distringas and all process thereunder may at any time be discharged by the order of this court, to be obtained as of course upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application by motion on notice, or by petition duly served, of any other person claiming to be interested in the stock sought to be affected by such writ; and that upon or after such application, such costs thereof, and in relation thereto, and to the said writ, as to this court shall seem just, may, if this court shall think fit, be awarded and ordered to be paid by the person or persons who obtained such distringas, or upon an application by any other person or persons, by such person or persons. (3rd ibid.)

The order of course is obtained at the Rolls' secretary's office on a short petition, stating merely the date of the issuing of the writ and its object and the petitioner's desire to have it discharged, and praying accordingly.

The Governor and Company of the Bank of England having been served with such writ of distringas, and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer or to pay such dividends, shall not, by force or in consequence of such distringas, be authorized, without the order of this court, to refuse to permit such transfer to be made, or to withhold payment of such dividends for more than eight days after the date of such request. (4th ibid.)

Upon leaving such affidavit as aforesaid with the patentee

of the subpœna office, there shall be paid to such patentee the sum of 1*s.* for filing such affidavit; and within twenty-four hours from the time when such affidavit shall be so left, the said patentee shall pay the said sum of 1*s.* to the clerk of the affidavits, and cause such affidavit to be filed and registered at the office of such clerk. (5th ibid.)

But now the affidavit is filed by the record and writ clerk.

Upon the sealing of such writ of distringas the sum of 5*s.* 6*d.* shall be paid to the patentee of the subpœna office, and out of such sum the said patentee shall pay the sum of 4*s.* to the accountant-general, to be by him placed to the credit of the account entitled "The Suitors' Fee Fund Account." (6th ibid.)

It need scarcely be observed, that this order is not now carried out.

For and in respect of the preparation and service of such writ of distringas, and the præcipe and attendance in respect thereof, such costs shall be allowed as by the rules and practice of this court are allowed for the preparation and service and attendance in respect of a writ of subpœna to answer a bill. (7th ibid.)

The General Order of the 10th December, 1841, provides that the affidavit required by the 2nd of the last mentioned orders shall, instead of being in the form set out at the foot of those orders, be in the form following:—

A. B. [*the name of the party or parties in whose behalf the writ issued out*] *v.* The Governor and Company of the Bank of England.

I —— of —— do solemnly swear that, according to the best of my knowledge, information and belief, I am [*or, if the affidavit is made by the solicitor*, A. B., of ——, is] beneficially interested in the stock hereinafter particularly described, that is to say, [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing.*]

The writ, when issued, together with the notice containing the particulars, are to be taken to the solicitors of the Bank,

who, on receiving the fee of 13*s.* 4*d.*, will enter the same in their book, keep the writ and notice, and place the stop upon the fund.

STAYING PROCEEDINGS.

The court will in some cases stay proceedings under a decree or order, pending an appeal or rehearing, but this will not be done generally, unless a substantial reason, such as that the appeal, when it comes on, may be rendered useless, if it succeeds, if the decree or order is allowed to be prosecuted. Irreparable injury is in most cases considered a sufficient reason, but not always so. (See *Waldo* v. *Caley*, 16 Ves. 212; *Walburn* v. *Ingelby*, 1 M. & K. 84.) In all applications to stay the execution of a decree or order, the court requires two things to be clearly shown, viz., that there has been no improper delay on the part of the applicant, and that there is some doubt as to the propriety of its own conclusion. (*Saunders* v. *Richardson*, 23 L. T. 18.)

The application is made by motion on notice, and should be made without any delay after the decree or order is pronounced. (*Herring* v. *Cloberry*, 12 Sim. 410.) It must be made first to the judge who pronounced the decree or order (46th G. O., 1828), and afterwards, if thought proper, to the Court of Appeal. It is quite in the discretion of the court to stay proceedings, according to the circumstances of the case, even where irreparable mischief could not take place. (*Corporation of Gloucester* v. *Wood*, 3 Hare, 150; 7 Jur. 1151; *Attorney-General* v. *Munro*, 12 Jur. 318.) The court generally imposes terms where it entertains the motion, such as payment of money into court and payment of interest: and in refusing it, may order security to be given for the restitution of the money to be paid. (*Swisse* v. *Lord Lowther*, 2 Hare, 438; 7 Jur. 808, and the cases there cited.) Generally, proceedings to recover costs will not be stayed, even on payment of the money into court. (*Archer* v. *Hudson*, 8 Beav. 321.)

When the plaintiff is proceeding both in this court and at law for the same matter, the court will, after the defendant has fully answered, interfere to compel the plaintiff to abandon one of the two suits. The 7th General Order, 2nd November, 1850, provides, that a defendant, whose answer is not excepted to or set down for hearing on former exceptions, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, upon the expiration of eight days after his answer, or further answer, is filed, obtain as of course, on motion or petition, the usual order for the plaintiff to make his election in which court he will proceed. And the 13th Order provides, that a defendant, whose answer is excepted to, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, by notice in writing, require the plaintiff to set down the exceptions within four days from the service of the notice. And if the plaintiff does not set down such exceptions within such four days, such defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which court he will proceed.

The order is quite of course, and may be obtained at the Rolls or on a motion paper signed by counsel, and marked by the registrar in court. If it proves that the two suits are for different matters, the order so obtained may be discharged; and where it was doubtful, the court directed a reference, to ascertain the fact (*Mills* v. *Fry*, 3 V. & B. 9); and upon the result of the reference a further application may be made to the court. (*Boyd* v. *Heinzelman*, 1 V. & B. 382.) The 16th Order of 26th October, 1842, requires the solicitor to sign the election, which is also prepared by him and filed in the report office, where an office copy is obtained. Notice of filing is served on the other side. If the plaintiff elects to proceed at law, the bill in equity will be dismissed with costs; but on failure at law, he may file another bill in equity. (*Countess of Plymouth* v. *Bladon*, 2 Vern. 32.) If he elects

to proceed in equity, the action at law will be stayed. A mortgagee is, however, an exception to this rule, he being allowed to avail himself of all his legal and equitable remedies at the same time. (See *Lyster* v. *Dolland*, 1 Ves. 431.) But where the rule is applicable, as in all other cases, it applies to litigation abroad as well as at home. (See *Harrison* v. *Gurney*, 2 J. & W. 563; *Bushby* v. *Munday*, 5 Madd. 297; *Beckford* v. *Kemble*, 1 S. & S. 7; *Ostell* v. *Lepage*, 16 Jur. 1134; *Pieters* v. *Thompson*, Coop. 294.)

Also, when two suits are instituted for the same purpose in this court, the proceedings in one of them may be stayed after a decree obtained in the other. But a decree must first be obtained. It matters not which suit was first instituted; nor whether by bill, or by claim, or by summons, if a decree, or order having the effect of a decree, has been made. (*Ritchie* v. *Humberstone*, 17 Jur. 756; 22 L. J. 1006.) But if the suit sought to be stayed seeks any thing that cannot be attained in the other suit, that will be a reason for allowing it to proceed. The question always is whether more is asked by such suit than can be obtained in the other. *Rigby* v. *Strangways*, 2 Phil. 177.) The application may be by summons at chambers, if both suits are before the same judge; otherwise it has been held that the application should be made to the court to which the suit proposed to be stayed is attached. (*White* v. *Johnson*, 2 Phil. 689; 17 L. J. 427.) But it has been since decided that the application to stay ought to be made to the court which has pronounced the decree. (*Ladbroke* v. *Bleadon*, 15 Beav. 457; 16 Jur. 851.) After a decree made in a cause, proceedings cannot be stayed by a vice-chancellor to whose court the cause is not attached. (*Scotto* v. *Stone*, 17 Jur. 588; 22 L. J. 911.) The order generally provides for the costs of the creditor's suit which is stayed, by directing payment out of the assets, or by allowing him to prove his debt under the decree in the working suit, and add his costs thereto. When the suits are brought on behalf of an infant, an inquiry is di-

rected, before decree, which suit is most for the infant's benefit. (*Anon.*, 3 Atk. 603.) This motion is of course, being granted upon the allegation of counsel that both suits are for the same purpose. (*Sullivan* v. *Sullivan*, 2 Mer. 40.) But it will not be granted after a decree. (*Taylor* v. *Oldham*, Jac. 527.) Upon the certificate an order may be obtained, staying proceedings in the defeated suit. (*Westby* v. *Westby*, 16 L. J. 483; 11 Jur. 764.)

The court will also stay proceedings in a suit, when the defendant submits to the plaintiff's demands, and offers him also his costs. (*Damer* v. *Lord Portarlington*, 2 Phil. 30; 10 Jur. 673; *Sawyer* v. *Mills*, 13 Jur. 1061.) An offer to pay into court a portion of the plaintiff's demand and leaving the remainder to be adjudicated upon in a cross suit was held not to be sufficient. (*Orton* v. *Bainbrigge*, 22 L. J. 979.) Several only of the defendants in a creditor's suit are entitled to a stay of proceedings upon payment of such part only of the plaintiff's claim as they are liable for, and, under special circumstances, without payment of costs. (*Holden* v. *Kynaston*, 2 Beav. 204.) In a foreclosure suit, on a motion by a subsequent mortgagee, the court ordered the bill to be dismissed on payment into court by the mover of a fixed sum to answer plaintiff's claim, and the costs of all parties. (*Challie* v. *Gwynne*, 1 Kay, App., 46.) See also *Jones* v. *Tinney* (1 Kay, App., 45), where the bill was also dismissed upon similar terms, but a different form of order was used.

When a decree, or order having the effect of a decree, is made for the administration of the assets of a deceased person, creditors will be restrained from proceeding at law against those assets, though not from proceeding against the representatives of the deceased personally. (*Kent* v. *Pickering*, 5 Sim. 569.) And this court will interfere against a Scotch corporation, having large real estates in England, to stay proceedings in the Court of Session to obtain payment of a debt due from the testator, though entitled to a preferable lien

upon the testator's shares in the company ; and service of the notice of motion at the office in London is good service, where it is admitted that the corporation had notice at the head office in Scotland. (*M'Laren* v. *Stainton*, 22 L. J. 274.) See also as to the rule being extended to proceedings in foreign courts, *Graham* v. *Maxwell* (1 M'N. & G. 71 ; 18 L. J. 225 ; 13 Jur. 217).

Where also a second suit is commenced before the costs of the first suit are paid or provided for, the court will generally stay proceedings. (See *Spires* v. *Sewell*, 5 Sim. 193 ; *Altree* v. *Horden*, 5 Beav. 623 ; 12 L. J. 76 ; 7 Jur. 247 ; *Long* v. *Storie*, 13 Jur. 1091.)

Where a plaintiff became bankrupt after decree, he and his assignees were ordered to elect either to file a supplemental bill, or that all proceedings should be stayed. (*Clarke* v. *Tipping*, 16 Beav. 12. See *Whitmore* v. *Oxborrow*, 1 Coll. 91.)

ORDERS OF COURSE.

Orders of course are obtained on motion or petition of course, and when made on motion are drawn up at the order of course seat in the registrar's office, but when on petition, they are drawn up and entered at the Rolls secretary's office, where such petitions are mostly presented. When the order is obtained on motion, it is entered, if contained in one page, which it usually is to save time, on leaving a copy at the entering seat in the registrar's office. See "*Motions*" and "*Petitions*," ante, for further information as to applying for and drawing up orders of course.

The 29th section of the 13 & 14 Vict. c. 35 (Sir George Turner's Act) repeals, so far as relates to orders on motion or petitions of course, so much of the act 53 Geo. 3, c. 24, and of the act 5 Vict. c. 5, as prevents a Vice-Chancellor from discharging, reversing or altering any decree, order, &c. of the Lord Chancellor or Lord Keeper or Master of the Rolls, or of any other Vice-Chancellor ; and enacts, that it

shall be lawful for the Master of the Rolls and the Vice-Chancellors respectively to discharge, reverse or alter any order made on motion or petition of course by any other of them or by the Lord Chancellor.

The 26th of the General Orders of the 2nd of November, 1850, requires, that applications to discharge, reverse or alter any order made on motion or petition of course by the Lord Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, shall be made to the judge to whom special applications in the cause or matter in which such order is made, ought to be made according to the practice of the court, and the general rules and orders applicable thereto.

The Master of the Rolls refused, with costs, an application to discharge an order of course obtained at the Rolls in a cause attached to one of the Vice-Chancellors' courts. (*Cooper* v. *Knox*, 15 Beav. 102; 21 L. J. 383.)

SERVICE OF WRITS, NOTICES, ORDERS, WARRANTS, RULES, ETC., UPON SOLICITORS AND UPON PARTIES SUING OR DEFENDING IN PERSON.

By the 17th General Order, 26th October, 1842, it is provided, that every solicitor of a party suing or defending by a solicitor shall cause to be indorsed or written upon every writ which he shall sue out, and upon every information, bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions, which he may leave with the clerks of records and writs to be filed, and upon all instructions which he may give to the clerks of records and writs for any appearance or other purpose, his name, and place of business, and also (if his place of business shall be more than three miles from the record and writ clerks' office), another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, orders, warrants, rules and other documents, proceedings, and written communications, may be left for him; and where any such solicitor shall only be the agent of any

other solicitor, he shall add to his own name or firm and place of business, the name or firm and place of business of the principal solicitor.

By the 19th ibid. it is provided, that where the party sues or defends by a solicitor, and no address for service of such solicitor shall have been indorsed or added pursuant to the directions of the 17th Order, all writs, notices, orders, warrants, rules and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the sworn clerks or waiting clerks, shall, unless the court shall otherwise direct, be deemed sufficiently served upon the party if served upon his solicitor at his place of business; but if an address for service of such solicitor shall have been indorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party if left for his solicitor at such address for service.

By the 20th ibid. it is provided, that every party suing or defending in person shall cause to be indorsed or written upon every writ which he shall sue out, and upon every information, bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions, which he may leave with the clerks of records and writs to be filed, and upon all instructions which he may give to the clerks of records and writs for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the record and writ clerks' office), another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, may be left for him.

By the 21st ibid. it is provided, that where the party sues or defends in person, and no address for service of such party

shall have been endorsed or written pursuant to the directions of the 20th Order, and in cases where any party has ceased to have a solicitor, all writs, notices, orders, warrants, rules, and other documents, proceedings and written communications not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the sworn clerks, or waiting clerks, shall, unless the court shall otherwise direct, be deemed to be sufficiently served upon the party, if served upon him personally, or at his place of residence; but if an address for service of such party shall have been endorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party if left for him at such address for service.

By the 22nd ibid. it is provided, that all writs, notices, orders, warrants, rules, and other documents, proceedings, and other written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served on the clerks in court, or waiting clerks, shall be served before eight o'clock in the evening of the day on which the same shall be served, or otherwise the same shall be deemed to have been served on the next following day, excluding Sundays.

CHANGING SOLICITOR PENDING CAUSE OR MATTER.

By the 18th General Order, 26th October, 1842, it is provided, that a party suing or defending by a solicitor, shall not be at liberty to change his solicitor in any cause or matter without an order of the court for that purpose, which may be obtained by motion or petition as of course; and that, until such order is obtained and served, and notice thereof given to the clerk of records and writs, the former solicitor shall be considered the solicitor of the party.

The object of this Order is to substitute the solicitor for the six clerk, and not to give to the solicitor a right to insist,

as against his client, upon acting in the cause until removed by the order of the court. (*Ward* v. *Swift*, 6 Hare, 309.)

The order is obtained usually, and most readily, upon a petition of course at the Rolls, bearing a 7*s.* Chancery stamp, as in other cases, and must be served on the solicitors in the cause or matter, and produced to the record and writ clerk to enter a minute thereof in his book.

This order is necessary when a solicitor in a cause or matter enters into partnership, if the name of the new partner is intended to be used (*Muttlebury* v. *Haywood*, 8 Jur. 1085); but upon the death of a solicitor in a cause the proceedings may be continued by another solicitor without order (*Whalley* v. *Whalley*, 22 L. J. 632; 17 Jur. 254); and a defendant to whose separate account a sum of money has been carried may, without order, petition for its payment out of court by a solicitor who was not his solicitor in the cause. (*Waddilove* v. *Taylor*, 17 L. J. 384; 12 Jur. 598.)

OFFICIAL ATTENDANCE, AND VACATIONS AT THE OFFICES OF THE COURT.

By the 5th General Order, 8th May, 1845, it is provided, that the several offices of the court, except the offices of the accountant-general and of the masters in ordinary and taxing masters, are to be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter Week, Christmas Day, and all days appointed by proclamation to be observed as days of general fast or thanksgiving.

By the 6th ibid. it is provided, that the offices of the accountant-general, and of the masters in ordinary and taxing masters, are to be open on every day of the year, except the days specified in Order 5, and except during vacations.

By the 7th ibid. it is provided, that the offices of the vacation master in ordinary, and of the vacation taxing master, are to be open during the vacations on every day except the days specified in Order 5.

By the 8th ibid. it is provided, that the vacations to be observed in the several offices of the court, except in the office of the accountant-general, are to be four in every year, viz. the Easter Vacation, the Whitsun Vacation, the Long Vacation, and the Christmas Vacation; and—

1. The Easter Vacation is to commence and terminate on such days as the Lord Chancellor shall every year specially direct;
2. The Whitsun Vacation is to commence on the third day after Easter Term, and to terminate on the second day before Trinity Term in every year;
3. The Long Vacation is to commence on the 10th day of August, and terminate on the 28th day of October in every year;
4. The Christmas Vacation is to commence on the 24th day of December in every year, and terminate on the 6th day of the following month of January; and
5. The days of the commencement and termination of each vacation are to be included in and reckoned part of such vacation.

By the 9th ibid. it is provided, that the vacations in the office of the accountant-general are to be the same as in the other offices, except as to the Long Vacation, which, in that office, is to commence and terminate on such days as the Lord Chancellor shall every year direct.

By the 10th ibid. it is provided, that the Lord Chancellor may from time to time, by special order, direct the offices to be closed on days other than those mentioned in Order 5, and direct any of the vacations to commence and terminate on days different from the fixed days mentioned in Order 8.

COMPUTATION OF TIME.

By the 11th General Order, 8th May, 1845, it is provided, that when any limited time from or after any date or event is appointed or allowed for doing any act or taking any proceeding, the computation of such limited time is not to

include the day of such date or of the happening of such event, but is to commence at the beginning of the next following day; and the act or proceeding is to be done or taken at the latest on the last day of such limited time according to such computation.

By the 12th ibid. it is provided, that when the time for doing any act or taking any proceeding is limited by months not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each.

By the 13th ibid. it is provided, that when the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or taken if done or taken on the day on which the offices shall next open.

By the 14th ibid. it is provided, that the times of vacation are not to be reckoned in the computation of the times appointed or allowed for the following purposes:

Amending or obtaining orders for leave to amend bills.

Setting down pleas, demurrers, or objections for want of parties.

Filing replications, or setting down causes under the directions of Article 41 of Order 16.

By the 15th ibid. it is provided, that the day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to plead, answer, or demur.

By the 4th General Order, 2nd November, 1850, it is provided, that the times of vacation are not to be reckoned in the computation of the time allowed for filing or setting down exceptions for scandal, impertinence, or insufficiency, in

cases where the time is not limited by notice given pursuant to the 13th of these Orders.

By the 1st General Order, 1st June, 1854, it is provided, that if the fourteen days within which, pursuant to the orders of the court, a defendant is bound to file his affidavits in answer to a motion for a decree, or the seven days within which the plaintiff is bound to file his affidavits in reply thereto, or the nine weeks after issue joined within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such nine weeks within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively is extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order. Provided always, that in cases where the above-mentioned periods of fourteen days and nine weeks respectively shall be extended by virtue of this order, the seven days within which the plaintiff is bound to file his affidavits in reply, and the month during which a witness is subject to cross-examination, shall be respectively taken to commence from the expiration of such extended period.

COPIES OF PLEADINGS AND OTHER PROCEEDINGS, &c.

A change of practice has been effected by the recent general orders with reference to the making and delivering certain copies of pleadings filed, and other particulars in the course of a suit or matter depending in this court. The following regulations must now be observed:—

Allowances for copying to cease.

From and after the 28th October, 1852, the several allowances for copying provided for and directed to be paid to the clerk of reports, the clerks of entries, the assistant clerk of affidavits, the clerks of the examiners, and the copying or writing clerks of the masters in ordinary, by any act or

acts of parliament now in force, shall cease. (15 & 16 Vict. c. 87, s. 5.)

Power to Lord Chancellor to make Regulations as to Copies.

The Lord Chancellor may, by any order or orders to be from time to time made by him, make such regulations as to the making and delivering copies of the pleadings and other proceedings, and of the documents relating thereto, and the manner in which such copies should be paid for, and the amount of charge for the same, and by whom the amount to be so charged should be received, as may from time to time seem expedient. (Ibid.)

By whom general Copies to be made.

Instead of being made and delivered by officers of the court at the office where they are filed or left, copies are, upon the requisition and undertaking of the party or his solicitor, required to be made and delivered by the party or his solicitor filing or leaving same; or, as depositions of witnesses and examinations of parties, and affidavits filed by claimants, by the party or his solicitor required to take office copies. (1st G. O., 25th October, 1852.)

Exemptions.

The foregoing rule is subject to the following exemptions, viz., office copies of proceedings filed in the report office; of answers, pleas and demurrers; office copies of depositions of witnesses and examinations of parties taken by the party on whose behalf such depositions and examinations have been taken; office copies of affidavits to be made for and taken by the party filing same; and office copies of affidavits filed by claimants and taken under Order 37 of 16th October, 1852. (1st G. O., 25th October, 1852.)

Request and undertaking to pay.

The application for any copy is to be written and delivered to the party by whom it is to be furnished, or his solicitor, with an undertaking to pay the proper charges. (Ibid.)

Time for delivery.

The copies are to be ready for delivery in forty-eight hours after delivery of request and undertaking, or within such other time as the court may in any case direct, and delivered accordingly upon demand and payment at the rate of 4*d.* per folio. (Ibid.)

Paupers.

The charges for copies of pleadings, and other proceedings and documents furnished under the above order of October, 1852, to a person admitted to sue or defend in formâ pauperis, or to his solicitor, by or on behalf of any other party, shall be at the rate of 1½*d.* per folio; provided always, that if such person shall become entitled to receive dives costs, the charges for such copies shall be at the rate of 4*d.* per folio; and nothing shall be allowed in taxation in respect of such charges, until such person or his solicitor shall have paid or tendered to the solicitor or party by whom such copies were furnished, the additional 2½*d.* per folio. But this proviso shall not apply to any copy which shall have been furnished by the party himself, who is directed to pay the costs, and not by his solicitor. (9th G. O., 1st June, 1854.)

The charges for copies furnished by a person admitted to sue or defend in formâ pauperis, other than those furnished by his solicitor, shall be at the rate of 1½*d.* per folio. (10th ibid.)

Copies of Costs.

Copies of bills of costs are to be made side for side with the bills left in the office. (1st G. O., 25th October, 1852.)

Folios numbered—Indorsement—Responsibility.

The folios are to be numbered consecutively in the margin, and the name and address of the party or solicitor furnishing same indorsed as upon proceedings in court; the party or solicitor being answerable for the accuracy of the copies. (Ibid.)

Affidavits on ex parte Injunctions and Ne Exeat Regno.

The party obtaining an ex parte injunction or writ of ne exeat regno is to deliver copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of the written request and undertaking, or within the time specified in the request, or as directed by the court. (Ibid.)

Production of Office Copies.

Any party or solicitor who has taken any office copy mentioned in rule 2 of General Orders of 25th October, 1852, is to produce it in court, or at the judge's chambers, when required for the purpose of the proceedings to which it relates. (Ibid.)

How Copies are to be written, &c.

All office copies, and copies furnished by parties or solicitors, shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers; and unless the copies furnished by parties or solicitors are so written, they shall not be entitled to be paid for them. (2nd G. O., 25th October, 1852.)

Refusal or Neglect to furnish Copies—Costs.

If any solicitor required as aforesaid refuses, or for two clear days from the application neglects to furnish any such copy, the person requiring it may procure a copy from the office where the original is filed, as if no such application had been made, and in such case no costs shall be due or payable to the solicitor in respect of the copy so applied for. (3rd ibid.) If any solicitor shall so neglect for such two clear days, or for one clear day, a corresponding addition shall be made to the time for taking any proceeding to be taken after obtaining such copy, so that the person requiring it may be as little prejudiced as possible by such neglect. (4th ibid.)

The taxing master shall not allow any costs in respect of any copy taken as aforesaid, unless it appear to him to have been requisite, and made with due care as regards contents and writing. (5th ibid.)

Entry and Examination of Decrees, Orders, &c.—Remuneration for same, and for Office Copies.

There shall be paid for entering and examining the decrees and orders and other documents of this court, under the direction of the clerks of entries, and for making, writing, counting and examining all office and other copies of official documents and records of this court, under the control of the master of the reports, the sum of $1\frac{1}{4}d.$ per folio of ninety words, and the sum of $\frac{1}{4}d.$ per folio for examining and counting those copies that are brought by the solicitors and suitors of this court to be marked as office copies. (1st G. O., 9th November, 1852.)

Entry of Decrees, Orders, &c.—Office Copies how to be made, &c.; and verified.

The said decrees and orders and other documents shall be entered under the direction of the clerks of entries in the books kept by them for that purpose, without abbreviations, and in a clear and legible hand; and all office copies shall be made and written without abbreviations, and in a clear and legible hand, the number of folios actually made, copied, counted and examined, to be verified by the certificate of the clerk of entries and the master of reports respectively. (2nd G. O., 9th November, 1852.)

Remuneration due for writing, &c., how to be ascertained and paid.

It is referred to the master to whom the matter of the suitors shall from time to time stand referred, to take accounts of what shall be due from time to time for such writing, entering, counting and examining actually done, under the control of the clerks of entries and the master of reports respectively, at the rate aforesaid; and from time to

time to certify the sum due in respect thereof, and to whom the same ought to be paid; and the amounts so certified are to be paid accordingly by the Governor and Company of the Bank of England out of any cash which may at any time be remaining in the Bank to the credit of the account entitled "The Suitors' Fee Fund Account;" and for the purposes aforesaid the accountant-general is to draw on the Bank according to the form prescribed by the act of parliament, and the general rules and orders of this court in that case made and provided. (3rd ibid.)

Remuneration for examining Office Copies in Record and Writ Office.

From and after the 28th October, 1852, there shall be allowed and paid the sum of ¼*d.* per folio for examining those copies of affidavits and other documents that are brought by the solicitors and suitors of the court to be marked as office copies in the Office of Records and Writs. (G. O. of Master of the Rolls of 27th November, 1852.)

Length of Folio—Computation of Figures.

From and after the 2nd July, 1854, all office copies and other copies of pleadings, proceedings and documents shall (except in the cases of transcripts of accounts in the accountant-general's office) be counted and charged for after the rate of seventy-two words per folio; and where the same or any portion thereof shall comprise columns containing figures, each figure shall be counted and charged for as one word. (1st G. O., 21st June, 1854.) To be paid by means of stamps so far as relates to documents furnished by the court. (3rd ibid.)

Accountant-General's Transcripts.

From and after the 2nd July, 1854, the charge for all transcripts of accounts made in the office of the accountant-general shall be after the rate of 2*s.* for each opening of such transcript, consisting of the debtor and creditor sides of the account to be entered therein. (2nd ibid.) To be paid by means of stamps. (3rd ibid.)

Office Copies, &c., issued by Master of Reports and Entries.

The 15 & 16 Vict. c. 87, s. 34, requires that the duties relating to the signing of the copies and extracts made in or issuing from the office of the master of reports and entries theretofore performed by the registrars of the said court, so far as it shall be found necessary or expedient to continue such duties, shall be performed by the master of reports and entries, or the registrars of the said court, in such manner and under such rules and regulations, as the Lord Chancellor shall from time to time by any order direct; and by the General Order of the 27th July, 1852, the copies or extracts made in or issuing from the office of the master of reports and entries, and certificates of no cause shown, are required to be signed by him alone, unless prevented by absence or some unavoidable or reasonable ground, when the same shall be signed by the registrar who shall be employed in counter-signing notes or cheques drawn by the accountant-general upon the Bank of England.

Fees.

On the subject of fees payable in the offices of this court, as well as of solicitors' fees, considerable changes have been effected by the recent acts and orders. They may be pointed out as follows:—

Lord Chancellor may regulate Fees.

The Lord Chancellor may, by any order or orders to be from time to time made by him, vary, reduce or abolish all or any of the fees payable in relation to proceedings in the Court of Chancery, and substitute one or more fee or fees in lieu thereof, and direct that all or any of such fees shall, from a day to be named in such order or orders and thenceforth, be collected by means of stamps to be provided and used in manner hereinafter mentioned. (15 & 16 Vict. c. 87, s. 6.)

Lord Chancellor may impose Fees and direct Payment by Stamps.

By the 2nd and 3rd sections of the Chancery Suitors' Further Relief Act (16 & 17 Vict. c. 98), it is provided, that, if and when it shall become necessary for the purposes aforesaid, it shall be lawful for the Lord Chancellor, by any order or orders to be from time to time made for that purpose, to impose such fees in relation to proceedings in the said Court of Chancery as to him shall seem meet, and to direct that such fees shall be collected by means of stamps, to be provided and used in the manner now adopted with reference to fees collected by means of stamps in the said court, and to alter, diminish or abolish such new or additional fees, as circumstances may from time to time warrant him in so doing.

Payment of Fees by Stamps.

From and after the day named in any order or orders of the Lord Chancellor, unless and until the Lord Chancellor shall otherwise direct, none of the fees mentioned in such orders respectively shall be received in money, but by a stamp denoting the amount of the fee which otherwise would be payable; and where any fee shall be payable in respect of any document such stamp shall, at the expense of the party liable to pay the fee, and in such manner and under such regulations as shall by any order or orders be directed, be stamped or affixed on the vellum, parchment or paper on which the proceeding in respect whereof such fee is payable is written, printed or engrossed, or which may be otherwise used in reference to such proceeding. (15 & 16 Vict. c. 87, s. 7.)

Duties of Commissioners of Inland Revenue as to Stamps, Accounts and Payment of Monies.

The Commissioners of Inland Revenue shall from time to time, upon the receipt of any order of the Lord Chancellor in that behalf, give the necessary directions for carrying the

same into effect, and shall provide everything that is requisite for that purpose, and shall do or cause to be done everything that is necessary for the receipt and collection of the money to be paid for such stamps; and the said commissioners shall cause separate and distinct accounts to be kept of all sums of money received or collected by them under the provisions of any such order or orders, and of all costs, charges and expenses incurred by them or by their direction in carrying the same into effect, and the said commissioners may pay and deduct and retain out of such monies all such costs, charges and expenses, and also deduct all sums of money repaid on allowances for spoiled stamps, as hereinafter provided for; and after such deduction they shall from time to time, and in such manner as the Lord Chancellor shall by any order direct, pay the monies so to be received and collected into the Bank of England to the credit of the accountant-general of the Court of Chancery, to be placed to the account there, intituled "The Suitors' Fee Fund Account." (15 & 16 Vict. c. 87, s. 8.)

Provision for Sale of Stamps.

The Lord Chancellor may direct any of the officers of the Court of Chancery whose duties may be diminished in consequence of the substitution of stamps for money payments, or otherwise, under this act, to act under the directions of the Commissioners of Inland Revenue in the sale and distribution of all or any of the stamps to be used under this act; but in case it appear to the Lord Chancellor, having reference to the duties to be performed by such officers or any of them, that it is not convenient that they should act as aforesaid in the sale and distribution of stamps, the Commissioners of Inland Revenue may appoint persons for such sale and distribution, and allow to such persons so appointed by them such discount or poundage as they may think fit. (15 & 16 Vict. c. 87, s. 9.)

Spoiled Stamps.

The Commissioners of Inland Revenue may from time to time make such regulations as they shall think fit for the allowance of such stamps, issued under the provisions of this act, as may have been spoiled or rendered useless or unfit for the purpose intended, or for which the owner may have no immediate use, or which through mistake or inadvertence may have been improperly or unnecessarily used, and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed, or by repaying the amount or value to the owner or holder thereof, after deducting the discount or poundage (if any) allowed on the sale of stamps of the like kind. (15 & 16 Vict. c. 87, s. 10.)

Former Acts relating to Stamps.

The provisions contained in the several acts for the time being in force relating to stamps under the care or management of the Commissioners of Inland Revenue shall (so far as the same are applicable and consistent with the provisions of this act), in all cases not hereby expressly provided for, be of full force and effect with respect to the stamps to be provided under or by virtue of this act, and to the vellum, parchment or paper on or to which the same stamps shall be impressed or affixed, and be applied and put in execution for collecting and securing the sums of money denoted thereby, and for preventing, detecting and punishing all frauds, forgeries and other offences relating thereto, as fully and effectually to all intents and purposes as if such provisions had been herein repeated and specially enacted with reference to the said last-mentioned stamps and sums of money respectively. (15 & 16 Vict. c. 87, s. 11.)

No Document to be received or used unless stamped.

No document which by any order or orders to be respectively made as aforesaid shall be required to have a stamp impressed thereon or affixed thereto, shall be received or filed,

or be used in relation to any proceeding in the Court of Chancery, or be of any validity for any purpose whatsoever, unless or until the same shall have a stamp impressed thereon or affixed thereto, in the manner directed by such order; but if at any time it shall appear that any such document which ought to have had a stamp impressed thereon or affixed thereto has, through mistake or inadvertence, been received or filed or used without having such stamp impressed thereon or affixed thereto, the Lord Chancellor may, if he think fit, order such stamp to be impressed thereon or affixed thereto, and thereupon, when a stamp shall have been impressed on such document or affixed thereto, in compliance with any such order, such document, and every proceeding in reference thereto, shall be as valid and effectual as if such stamp had been impressed thereon or affixed thereto in the first instance. (15 & 16 Vict. c. 87, s. 12.)

Stamps to be prepared.

Certain fees payable in relation to the proceedings in the Court of Chancery shall, on and from the 28th of October, 1852, and thenceforth, be collected by means of stamps, to be provided and used as by the act 15 & 16 Vict. c. 87, is directed, and the stamps for denoting the payment of the said fees shall be of the amounts set forth in the schedule hereto annexed; and this order shall be communicated to the Commissioners of Inland Revenue, so as that the said commissioners may give the necessary directions for carrying the same into effect as is provided by the said act; and the said commissioners shall once in every month cause to be paid into the Bank of England to the credit of the accountant-general of the Court of Chancery, to be placed to the account there intituled "The Suitors' Fee Fund Account," such sums of money as may have been received by them for the stamps hereinbefore mentioned, after deducting the costs, charges and expenses incurred by them, or by their direction, in carrying such order into effect, and all sums of money repaid or allowance for spoiled stamps; and notice

of each such payment shall at the time of making the same be given by the said commissioners to the said accountant-general, who shall certify the amount of such payment to the court. (G. O., 7th Sept. 1852.)

Schedule.—1*d.*; 4*d.*; 6*d.*; 1*s.*; 1*s.* 6*d.*; 2*s.*; 3*s.*; 4*s.*; 5*s.*; 10*s.*; 1*l.*; 2*l.*; 3*l.*; 4*l.*; 5*l.*; 10*l.*

Adhesive Stamps.

Stamps to be prepared by Commissioners of Inland Revenue, impressed upon adhesive paper, of the amounts following, viz.: 3*d.*, 4*d.*, 8*d.*, 1*s.* 4*d.*, 1*s.* 6*d.*, 2*s.* 6*d.* and 2*s.* 8*d.* (1st G. O., 3rd Dec. 1852.)

How used.]—Stamps of such several amounts shall be affixed by the parties requiring to use the same on the vellum, parchment or paper on which the proceeding in respect whereof such stamps may be required is written, printed or engrossed, or which may be otherwise used in reference to such proceeding. (2nd ibid.)

Obliteration of.]—Stamps so affixed shall immediately, on the receipt thereof by any officer of the Court of Chancery, be obliterated or defaced by the impressing thereon of a seal to be provided for that purpose, but so as not to prevent the amount of the stamp from being ascertained; and no such document shall be filed or delivered out until the stamp thereon shall be so obliterated or defaced. (3rd ibid.)

Solicitors' Fees.

By Order of 26th February, 1807, solicitors became entitled to the following fees, a few of which have however fallen into disuse, by reason of the changes of practice.

	£	s.	d.
Drawing warrant to prosecute and filling up same on a 5*s.* stamp, each	0	2	6
Drawing præcipe for subpœna, and attending to leave same at subpœna office, and afterwards for same ..	0	6	8
Attending taking instructions for bills, answers, interrogatories and examinations, each	0	13	4
Attending taking instructions for special affidavits ..	0	6	8

	£	s.	d.
For drawing bills, answers, interrogatories and affidavits, per folio of 90 words, including fair copy ..	0	1	0
For ingrossing same on parchment	0	0	6
For ingrossing affidavits on paper	0	0	4
For fair copies of all pleadings upon record of 90 words, per folio	0	0	4
For abbreviating the same, per folio	0	0	4
For fair copies of all briefs	0	3	4
For attending each counsel with briefs, for hearing of a cause, and on special petitions and motions ..	0	6	8
For attending counsel with instructions, and the register to draw up order, and entering on common petitions and motions of course	0	6	8
For attending Lord Chancellor or the Master of the Rolls' secretary, to present every special petition, and afterwards for same	0	6	8
For attending the court every day on which a cause or petition stands in the paper	0	10	0
Attending when heard	0	13	4
For attending the court on every special motion, each day	0	13	4
For service of every order or petition on a clerk in court	0	2	0
For copy and service of every master's warrant or summons on a clerk in court	0	1	6
For personal service of ditto on a party	0	10	0
For service of ditto on a solicitor, where no clerk in court	0	2	6
For attending defendants on their being served with subpœnas, and taking instructions to appear ..	0	6	8
For drawing every warrant to defend	0	2	6
For attending at the public office to get messenger sworn upon the return of all commissions	0	6	8
For attending every witness to be sworn and examined in town before examiner	0	6	8
Attending with defendant or deponent to get answer or special affidavit sworn	0	6	8
For attendance on every master's warrant or summons	0	6	8
For every attendance on the register, for directions to the accountant-general to sell or transfer stock ..	0	6	8
For drawing request to the accountant-general to lay out cash on each fund	0	2	6
Attending on accountant-general to lay out ditto ..	0	6	8
For every attendance at the Bank, to pay in money, and afterwards on accountant-general to file cashier's receipt	0	13	4

	£	s.	d.
For attendances on the register, to settle minutes of decrees and decretal orders	0	13	4
For attending the register, on settling decrees, examining and passing same, and orders on further directions	0	13	4
For attending the register, on passing all other special orders	0	6	8
For attending to leave decrees and decretal orders to be entered, examining and taking same away ..	0	6	8
For attending to file special reports at the report office and afterwards for the copy	0	6	8
For attending to join and strike commissioners' names, for the examination of witnesses, for the solicitor who has not the charge of the commission	0	6	8
For attending to bespeak every special writ or special commission that issues in a cause (except subpœnas)	0	6	8
Drawing notice of taking answer or examination and copy	0	3	6
Attending two commissioners to sign the same ..	0	6	8
Service thereof not exceeding two miles	0	6	8
Ditto at a greater distance than two miles, 1*s.* per mile, but not to exceed 1*l.* 1*s.*			
For attending to take answers or examinations, each commissioner	0	13	4
For attending the execution of commissions for the examination of witnesses, each commissioner and each solicitor per day	2	2	0
For each commissioner's clerk, as ingrossing clerk ..	0	15	0
For attending to read over ingrossment of answers, or examination, previous to being sworn, if the same does not exceed twenty folios	0	6	8
For every additional fifty folios	0	6	8
For attending the master for every certificate to be signed by him, and for filing same	0	6	8
Drawing instructions for all advertisements to be signed by the master, and afterwards for same ..	0	6	8
Attending to get same inserted in Gazette	0	6	8
For drawing out caveat against signing and inrolling every decree and order	0	2	6
Attending entering caveat with secretary of decrees, &c.	0	6	8
For perusing abstracts every three brief sheets ..	0	6	8
For perusing the draft of every deed, for each skin ..	0	5	0
For examining the ingrossment with the draft, for every three skins	0	10	0
For making all attested copies, examining and attesting same, per folio	0	0	6

	£	s.	d.
Instructions for every special petition	0	6	8
Drawing same, per folio, and fair copy	0	1	0
Ingrossing	0	0	4
Copies to serve	0	0	4
For drawing special notices of motion	0	2	0
Copy and service on every clerk in court, each ..	0	2	0
For drawing charges and discharges, state of facts, and bills of costs, and fair copy for master, per folio ..	0	0	8
Term fee (exclusive of clerk in court's fee)	0	10	0
Letters and messengers, per term	0	5	0

N.B. The same fees and allowances, as above specified, to be made and allowed in all matters of lunacy and bankruptcy, except the fee for attending the court upon bankrupt petitions, whilst in the paper, which is to remain as heretofore, namely, 6*s.* 8*d.* per day, till the day the petition heard, and on that day 13*s.* 4*d.* to be allowed.

By Order of 22nd April, 1850, relating to claims, solicitors became entitled to the following fees:—

	£	s.	d.
For instructions to sue or defend	0	6	8
For instructions for every claim	0	13	4
For preparing and filing a claim	2	2	0
For preparing a writ of summons	0	13	4
For each writ after the first	0	6	8
For ingrossing claims and writs, per folio	0	0	6
For parchment: as paid.			
For each copy of writ to serve, per folio	0	0	4
For the brief to counsel to move for leave to file claim (exclusive of a copy of the claim for counsel and the court)	0	10	0
For the brief and instructions to counsel on the hearing (exclusive of any necessary copies)	1	0	0
For taking instructions to appear and for entering appearance:—			
For one or more defendants, if not exceeding three	0	13	4
If exceeding three, and not more than six, an additional sum of	0	6	8
If exceeding six, for every number not exceeding three, an additional sum of	0	6	8
For settling minutes, passing and entering order on hearing: the same charges as on a decretal order.			
For entering a caveat	0	6	8

	£	s.	d.
For procuring a certificate of no caveat	0	6	8

For term fees: as in a suit.

And also all such fees as by the present practice of the court they are entitled to, save such as are varied or rendered unnecessary by these present Orders.

By the 4th Order of 7th August, 1852, in lieu of solicitors' fees for instructions for bills, for ingrossing and copying bills and claims, for abbreviating and making briefs of bills, solicitors shall be allowed, in suits commenced after the 1st November, 1852, the fees specified in sched. (A) to Orders of 7th August, 1852, (A) (4th G. O.), and which are as follows:—

	£	s.	d.
For instructions for bill	1	14	0
For making a copy of a bill or claim for the printer, per folio	0	0	4
For correcting the proof sheet, per folio	0	0	2
For printer's bill (as paid), deducting any copies paid for by the defendant			
For amending each copy of a bill or claim to serve where there is no reprint	0	13	4
Instructions for brief, to be allowed on a replication being filed, or on a motion for a decree on a bill, or in an injunction cause on moving for the injunction; but so that this fee shall be charged once only in the progress of a cause	1	1	0
For amending each brief of a bill or claim where there is no reprint	0	13	4
For perusing and considering the bill on behalf of each defendant, or set of defendants, appearing by the same solicitor	1	1	0

[*See also previous and following pages.*]

Fees to be taken by the chief clerks of the chamber judges, the registrars, record and writ clerks, and solicitors, are specified in the General Orders of the 23rd October, 1852, whereby all fees received by officers of the court under those orders are directed to be accounted for and paid by them respectively once in every month into the Bank of England, in the name of the accountant-general, to be placed to the account entitled "The Suitors' Fee Fund Account;"

the amount so received and paid to be verified by the affidavit of the accounting party. Such fees are the following: —

Chief Clerks.

	£	s.	d.
For every original summons for the purpose of proceedings originating in chambers	0	5	0
For every duplicate thereof	0	5	0
For every other summons	0	3	0
For every advertisement	1	0	0
For every certificate or report	1	0	0
For every certificate upon the passing of a receiver's or consignee's account, a further fee in respect of each 100*l.* received, of	0	10	0
For every order drawn up by the chief clerk made upon applications for time to plead, answer or demur, for leave to amend bills or claims, or for enlarging publication or the period for closing evidence, or for the production of documents, or applications relating to the conduct of suits or matters	0	5	0
For every other order drawn up by the chief clerk ..	1	0	0

Registrars.

For orders made by a judge in chambers, drawn up by the registrar, the like fees as before directed to be taken by the chief clerk for orders drawn up by him.

Record and Writ Clerks.

For office copies of original depositions, and examinations, per folio	0	0	4
For entering appearances to judge's summons, same charge as for appearing to a bill.			
For stamping every copy of a bill or claim for service	0	5	0
For stamping every copy of a judge's summons for service	0	5	0
For examining every copy or part of a copy of a set of interrogatories, and marking same as an office copy	0	5	0

Solicitors.

For instructions to commence proceedings originating in chambers or to defend the same	0	13	4
For preparing an original summons for the purpose of proceedings originating in chambers, and the duplicate thereof	0	13	4
For attending at chambers to get such summons and duplicate examined and sealed	0	6	8

. .

	£	s.	d.
For attending at the Record and Writ Office to file duplicate and examine copies, and get same stamped	0	6	8
For indorsing a summons and the copies under Order 6 of 16th October, 1852, and attending to get same sealed	0	6	8
For entering the appearance for one or more defendants, if not exceeding three	0	6	8
If exceeding three, for every additional number not exceeding three, an additional sum of	0	6	8
In cases of proceedings originating in chambers the same term fee as in a suit.			
For preparing every other summons and attending to get same filled up and sealed at chambers	0	6	8
For each copy of a summons to serve or leave at chambers	0	2	0
For attending on a summons or other appointment, each day, a fee of 6*s.* 8*d.*, 13*s.* 4*d.*, or 1*l.* 1*s.*, according to circumstances; but the fee is to be 6*s.* 8*d.*, unless a larger fee is allowed by the judge or his chief clerk.			
Where from the length of the attendance, or from the difficulty of the case, the judge shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case to lay it before the judge shall have required skil and labour for which no fee has been allowed, the judge may allow such further fee, not exceeding one guinea, as in his discretion he may think fit.			
[*See also G. O., 2nd February, 1855, extending this power to* 10*l.* 10*s.*]			
For preparing every advertisement	0	6	8
For attending to get same approved and signed ..	0	6	8
For attending for every order drawn up by the chief clerk, and at the registrar's office to get same entered	0	6	8
For attending to enter claim under Order 36 of 16th October, 1852, and to file affidavit	0	6	8
For perusing the affidavits of claimants coming in under Order 36 of 16th October, 1852, and attending in chambers at the time appointed by the advertisement, where the number of claims does not exceed five	1	1	0
Where the number exceeds five, for every additional number, not exceeding five, an additional sum of ..	1	1	0
For attending to bespeak and procure office copy of certificate or report	0	6	8
For all other business performed, such fees as by the practice of the court they are entitled to for similar business.			

(*See also page* 578.)

Fees to be taken by means of stamps in the judges' chambers, masters' offices, registrar's office, report office, for affidavits, examiner's office, record and writ clerks' office, taxing master's office, Lord Chancellor's principal secretary's office, office of secretary at the Rolls, and accountant-general's office, are specified in the General Orders of the 25th October, 1852, and of the 4th December, 1852. (6th and 9th Orders of 25th October, 1852, and schedules, and 2nd Order of 4th December, 1852.) They are the following:—

In the Judge's Chambers.

	£	s.	d.
For every original summons for the purpose of proceedings originating in chambers	0	5	0
For every duplicate thereof	0	5	0
For every other summons	0	3	0
For every order drawn up by the chief clerk, made upon applications for time to plead, answer or demur, for leave to amend bills or claims, or for enlarging publication, or the period for closing evidence, or for production of documents or applications relating to the conduct of suits or matters	0	5	0
For every other order drawn up by the chief clerk ..	1	0	0
For every advertisement	1	0	0
For every certificate or report	1	0	0
For every certificate upon the passing of a receiver's and consignee's account, a further fee in respect of each 100*l.* received, of	0	10	0

In the Master's Offices.

For every warrant or summons	0	3	0
For every certificate or report	1	0	0
For taking the acknowledgment of every married woman	1	6	8
For attending any court per day by the clerk	0	14	0
For every oath	0	1	6
For every certificate upon the passing of a receiver and consignee's account, a further fee in respect of each 100*l.* received, of	0	10	0

In the Registrar's Office.

For every decree or decretal order on the hearing of a cause, or on further directions; and on the hearing of a special case, including the court fee and the charge for entry	4	0	0

	£	s.	d.
For every order for transfer or payment out of court of an amount not exceeding 200*l.* stock or cash, or interest on stock not exceeding 10*l.* per annum, and for every order on petition where the petition is dismissed	0	10	0
For every order for transfer or payment out of court of an amount exceeding 200*l.*, but not exceeding 500*l.*, stock or cash, or interest on stock exceeding 10*l.* per annum, and not exceeding 25*l.* per annum, and for every order on special motion not herein otherwise specified	1	0	0
For every order on the hearing of claims, pleas, demurrers, exceptions, or on petitions not herein otherwise specified, or on petitions of appeal, rehearing, for injunctions, receivers, and for writs of ne exeat regno	2	0	0
For every office copy of a petition of appeal or rehearing	1	0	0
For every order on petition or motion of course, including the entry thereof	0	5	0
For every office copy of a decree or order	1	0	0

(*See also pages 583 and 589.*)

In the Report Office.

Upon every application for a search	0	0	6
For all office copies, at per folio	0	0	4

Affidavits.

For filing every affidavit, with or without schedules or other papers thereto annexed, including exhibits, if any	0	2	6
For the copy of every affidavit, for each folio.. ..	0	0	4
Upon every application to inspect an affidavit ..	0	0	6
Upon every application for the officer to attend with an affidavit or affidavits at the Lord Chancellor's, or at any of the courts at Westminster or in London, each day	0	10	0
Upon every application for the officer to carry an original affidavit to any assizes, for each day, besides reasonable expenses of officer	1	0	0
For every deponent, affirmant or declarant to an affidavit, affirmation or declaration sworn, affirmed or declared in London, or within ten miles of Lincoln's Inn Hall	0	1	6
Upon any application for the officer to attend an invalid, including the attendance	0	10	0

In the Examiner's Office.	£	s.	d.
For filing interrogatories	0	7	0
For all office copies, per folio	0	0	4
For every witness sworn and examined, including oath, for each hour	0	5	0
For every witness sworn and examined abroad (besides coach hire and reasonable expenses)	1	7	0
If more than five miles from the examiner's office, for the first day	2	15	0
For every other day	2	2	0
For attending the Lord Chancellor or the Master of the Rolls with record, per day	0	10	0
For attending any master at his office	0	10	0
For attending with record in any other court or place in London or Westminster, per day	1	0	0
If in the country, per day, besides reasonable expenses	2	0	0
Upon every application to inspect depositions, including the inspection	0	3	0
Upon every application to examine copies of depositions, with record to prove on trial at law	0	5	0
Upon every application to search book for causes, including search	0	1	0
Upon every application to search book for depositions, including search	0	1	0

N.B.—These fees have now ceased to be payable.

In the Record and Writ Clerks' Office.			
For all office copies, per folio	0	0	4
Filing every bill or information	1	0	0
For filing every claim	0	5	0
For filing every special case	1	0	0
Upon entering every appearance, if not more than three defendants	0	7	0
If more than three and not exceeding six defendants	0	14	0
And the same proportion for every number of defendants.			
For sealing an attachment or distringas, for not appearing or answering	0	8	0
For every certificate	0	4	0
For every copy of a bill or claim to be served	0	5	0
For every writ of summons, distringas or subpœna	0	5	0
For filing and entering duplicate of every judge's summons	0	5	0
For stamping every copy thereof	0	5	0

	£	s.	d.
For sealing every other writ	1	0	0
For every oath, affirmation, declaration or attestation upon honour	0	1	6
For examining every copy, or part of a copy, of a set of interrogatories, and marking same as an office copy	0	5	0
Upon every application for a search for a record, and for searching	0	2	0
Upon every application to inspect a record, and for inspecting the same	0	5	0
Upon every application to inspect exhibits, if occupied not more than one hour	0	5	0
If more than one hour, per diem	0	10	0
Upon every application for the officer's attendance in courts of law per diem, and for his attendance, besides reasonable expenses of the officer ..	1	0	0
Upon every application for the officer's attendance in a court of equity, per diem	0	10	0
For examining and signing enrolments of decrees and orders	3	0	0
For filing caveat against claim to revive, or against decree or order or enrolment	0	5	0
For filing supplemental statement or statement for revivor	0	10	0
For office copies of depositions taken before examiner, at per folio	0	0	4

(*See also pages 583 and 589.*)

In the Taxing Master's Office.

For every warrant or summons, but not more than one order or summons is to be issued on one bill, or set of bills, unless the taxing master shall think it necessary to issue a new warrant or summons ..	0	3	0
On signing every report and certificate	1	0	0
Upon the master's certificate of every bill of costs, as taxed, where the amount shall not exceed 20*l.* ..	0	10	0
Upon every additional 20*l.* or fractional part thereof, a further fee of	0	10	0
For every oath, affirmation or attestation upon honour	0	1	6

In the Lord Chancellor's Principal Secretary's Office.

On all attendable petitions, appeals, rehearings and letters missive..	1	0	0
On all non-attendable petitions	0	10	0
On a matter of course order, on a petition of right ..	0	10	0
On an order for a commission on a petition of right ..	1	0	0

In the Office of the Secretary at the Rolls.	£	s.	d.
On every petition set down for hearing, to include the fee on hearing	1	0	0
On the petition for every order of course	0	7	0
On the admission of every solicitor	1	17	0

In the Office of the Accountant-General.

For preparing English power of attorney, with affidavit, exclusive of stamp duty	0	3	6
For preparing foreign power of attorney without affidavit	0	3	0
For special power of attorney	0	5	0
For copies of accounts, debtor and creditor's side, per folio, as to be explained by general order .. .. (*See note below as to order superseding this charge.*)	0	0	3
Upon every application for a search	0	5	0

The above charge for copies of accounts has been altered as follows:—

The 2nd General Order of 21st June, 1854, directs, that from and after the 2nd July, 1854, the charge for all transcripts of accounts made in the office of the accountant-general shall be after the rate of 2*s.* for each opening of such transcripts, consisting of the debtor and creditor sides of the account, to be entered therein. This charge is to be paid by means of stamps. (3rd ibid.)

In the Registrar's Office.

For orders made by a judge in chambers, drawn up by the registrar, the like fees as by the Order of the 23rd October, 1852, are directed to be taken by the chief clerks to the judges for orders drawn up by such chief clerks.

(*See also pages* 583 *and* 585.)

In the Record and Writ Clerks' Office.	£	s.	d.
For amending every record of any bill	0	10	0
For amending every office copy thereof	0	5	0
Copies of documents left as exhibits, per folio ..	0	0	4

(*See also pages* 583 *and* 587.)

Fees to conveyancing counsel, accountants, merchants, engineers, actuaries and other scientific persons employed to assist the court or any judge thereof under sections 40, 41 and 42 of the act 15 & 16 Vict. c. 80, are to be regulated by

the taxing master, subject to appeal to the judge to whose court the cause or matter is attached, whose decision shall be final. (15 & 16 Vict. c. 80, s. 43.)

The fees specified in the 2nd part of the 1st schedule to the Orders of 25th October, 1852 (except as to the fees of taxation when the costs are payable out of a fund in court), shall be payable and collected by means of stamps denoting the amount of such fees, stamped or affixed, at the expense of the parties liable to pay them, on or to the vellum, parchment or paper on which the proceedings in respect whereof such fees are payable are written or printed, or which may be otherwise used in reference to such proceedings; and where any of such last-mentioned fees are payable in respect of any matter for which no document or paper is used, whereon the stamp could be affixed, the party or his solicitor shall apply for same by a short note or memorandum in writing, and a stamp denoting the amount of the fees so payable shall be stamped on or affixed to such note or memorandum. (6th G. O., 25th Oct. 1852.)

Fees of taxation, where the costs are directed to be paid out of a fund in court, shall not be payable by means of stamps, but carried over by the accountant-general to the credit of the Suitors' Fee Fund; and to that intent the taxing master shall in such cases certify the amount of such fees. (7th ibid.)

Fees of taxation (being the ad valorem duty) directed by Order of 25th October, 1852, to be levied by stamps on the master's certificate, shall nevertheless be due and payable on the amount of the bill as taxed, or on the amount of such part thereof as may have been taxed, although no certificate of the taxation shall be required; and the solicitor is in such case to cause the proper stamp (the amount thereof to be fixed by the master) to be impressed on or annexed to the bill of costs. (1st G. O., 4th Dec. 1852.)

REINVESTMENT OF MONEY IN LAND.

Where a petition by a vicar stated an agreement to purchase land therein particularly mentioned, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct, and prayed for a conveyance, and that the purchase-money of certain land belonging to the vicarage, which had been paid into court by a railway company by whom such land had been taken to the account of the vicar, might be paid out for the purpose of the proposed purchase without a reference to the master, the court made the order. (*Ex parte the Vicar of East Dereham*, 21 L. J. 677.) But the court must in such cases be satisfied by evidence of value and otherwise of the eligibility generally of the proposed purchase, and then it will in most cases, whether the application be made in court or at chambers, direct it to stand over in order that the title may be submitted to one of the conveyancing counsel of the court for his approval. (*In re Caddick*, 16 Jur. 965; 20 L. T. 59; and *In re Martin's Estate*, 20 L. T. 136.)

Upon a petition to invest the purchase-money of lands purchased by a railway company, the whole purchase-money was ordered to be invested without deducting the brokerage thereon, the petitioner undertaking to pay such brokerage, and the railway company was ordered to pay the petitioner the amount of the brokerage paid by him. (*In re Kendal and Windermere Railway Company* (*Braithwaite's Trust*), 1 Eq. Rep. 163; 22 L. J. 915.)

A petition for reinvestment of purchase-money in purchase of land ought to be heard before the same Vice-Chancellor who has made any previous order for temporary investment (*In re Harman's Bowden Park Estate Act*, 1 Eq. Rep. 246.)

If the purchase-money of lands taken by a railway company is invested in other lands sold in a suit in this court, a second petition entitled in the cause becomes necessary, and the company must bear the expense of both petitions. (*Carp-*

mael v. *Profitt*, 17 Jur. 875; 22 L. T. 64.) But where lands were taken from a corporation by a railway company who paid the price into court, and the corporation asked that that money, with other monies, might be laid out in another purchase, it was held, that the company should pay the costs according to the Lands Clauses Consolidation Act, and that the corporation should pay all extra costs by reason of the extra fund to be invested. (*In re Southampton and Dorchester Railway Company, Ex parte King's College, Cambridge*, 5 De G. & S. 621.) And where the investment asked for by the petition of the tenant for life was not approved of by the court, the company received the costs out of the fund, and no order was made as to the petitioner's costs. (*Re Hardy*, 18 Jur. 370; 23 L. T. 125.)

If the land taken by the company belonged to a charity, the petition for reinvestment must be presented with the leave of the Charity Commissioners under the act 16 & 17 Vict. c. 137, and must be entitled in the matter of Sir Samuel Romilly's Act (*Ex parte the Haberdashers' Company*, 23 L. T. 36); and the costs of the appearance of the attorney-general, and generally, when the money is reinvested in the redemption of land-tax, are payable by the company. (Ibid. 23 L. T. 216.)

[See also "*Investigation of Title*," and "*Execution of Deed under the Direction of the Court*," ante, pp. 305, 311.]

APPENDIX.

Acts relating to Trustees and Mortgagees.

THE TRUSTEE ACT, 1850,

AND

DECISIONS THEREUNDER.

13 & 14 Vict. c. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees. [5th August, 1850.]

Whereas an act was passed in the first year of the reign of his late majesty King William the Fourth, intituled "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases:" And whereas an act was passed in the fifth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in trust:" And whereas an act was passed in the second year of the reign of her present majesty, intituled "An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees:" And whereas it is expedient that the provisions of the said acts should be consolidated and enlarged: Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assem-

11 Geo. 4 & 1 Will. 4, c. 60.

4 & 5 Will. 4, c. 23.

1 & 2 Vict. c. 69.

bled, and by the authority of the same, that all proceedings under the said acts or any of them commenced before the passing of this act may be proceeded with under the said recited acts, or according to the provisions of this act, as shall be thought expedient, and, subject as aforesaid, that the said recited acts shall be and the same are hereby repealed: provided always, that the several acts repealed by the said recited acts shall not be revived, and that such repeal shall only be on and after this act coming into operation.

Interpretation of terms.

II. And whereas it is expedient to define the meaning in which certain words are hereafter used; it is declared, that the several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,)

The word "lands" shall extend to and include manors, messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

The word "stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein:

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing,

or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple Modes of Assurance," and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands:

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another:

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the great seal for the time being:

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being:

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person:

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo:

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs:

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

The word "mortgage" shall be applicable to every estate, interest or property in lands or personal estate which would in a court of equity be deemed merely a security for money:

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate:

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

Lord Chancellor may convey estates of lunatic trustees and mortgagees;

III. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust, or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*a*).

(*a*) 1. The Lord Chancellor stated that the court would not take upon itself to inquire into the fact, whether a lunatic was a trustee within the meaning of this act, but that there must be the usual inquiry before the master. (*In re Ramshay*, 15 Jur. 69.)

2. The court has power to make a vesting order under this section, notwithstanding a former petition under the 1 Will. 4,

IV. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent

may convey contingent rights.

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c. 60, and an order of reference thereunder, and a master's report made; and such order was made on petition to confirm that report, and for a vesting order; but the costs of the former proceedings under the old act were not given for want of jurisdiction. (*In re Fulham*, 15 Jur. 69.)

3. This act does not give the Lord Chancellor of Great Britain, sitting in lunacy, jurisdiction over lands in Ireland. (*In re Davies*, 3 M'N. & G. 278.) [See note 2 to sect. 5.]

4. The court will not permit proceedings to be taken for the removal of a trustee, grounded on an allegation of lunacy, the truth of which is denied, except by bill. (*Re Campbell*, 18 L. T. 202.)

5. When the legal estate of a married woman in customary freeholds was vested in a lunatic trustee, and the married woman mortgaged the estate by deed enrolled under the Fines and Recoveries Act, the court declined to make an order on petition alone; but on the facts being stated in a special case under the 13 & 14 Vict. c. 35, and such case coming on for hearing with the petition, the Lord Chancellor made an order vesting the legal estate in the mortgagee. (*Torbuck* v. *Hewitson, In re Hewitson*, 19 L. T. 342.)

6. A doubt was expressed in the case *In re Pattinson*, 21 L. J. 280, whether the Lords Justices acting in lunacy had jurisdiction to make an order vesting a trust estate of which a person of unsound mind who was heir at law of a deceased trustee was seised, the words of this act being "The Lord Chancellor intrusted by virtue of the Queen's sign manual," and the applicant was recommended by their lordships to go to the Lord Chancellor, who then made the order. But if this were a defect it is cured by the 11th section of the Trustees Act Extension, page 629, *infra*.

7. The committee of a lunatic mortgagee may either obtain an order vesting the estate in the mortgagor at the mortgagor's expense, or for the committee to convey, the committee paying the costs out of the lunatic's estate.

8. The Lord Chancellor refused an order under this act in the following case:—The petitioner had purchased customary property, and had it conveyed to his son, then a minor, and who afterwards became a lunatic. It was proved that the purchase money was furnished by the petitioner, and that he conveyed the estate without intending to dispose of his interest therein; but solely because it was necessary, according to the custom, to convey it to a trustee in order to devise it, and that

right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Lord Chancellor may transfer stock of lunatic trustees and mortgagees.

V. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint (*b*).

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his son was, on attaining twenty-one, to have executed a declaration of trust. The court directed a bill or claim to be filed, so that the lunatic might be brought before the court and his interest duly represented. (*In re Collinson*, 21 L. T. 81.)

(*b*) 1. The Lord Chancellor declined to order the transfer of funds standing in the joint names of the lunatic and another to the party claiming such transfer, without a previous reference to the master. (*In re Were*, 3 M'N. & G. 233.)

2. A new trustee was appointed under this act, and the trust premises vested in him jointly with the continuing trustees, in a case where one of three trustees was lunatic, and though the will contained power to appoint new trustees. (*In re Davies*, 3 M'N. & G. 278.)

3. See note 4, to sect. 3.

VI. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint. Power to transfer stock of deceased person.

VII. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*c*). Court of Chancery may convey estates of infant trustees and mortgagees.

(*c*) 1. An intestate leaving an infant his heir at law had in his lifetime contracted to sell real estate, and received the purchase, but no conveyance was executed. The purchaser presented a petition for a conveyance on behalf of the infant on a vesting order, but the court held that the order could not be made on petition. (*Re Dickinson*, 17 L. T. 231; *Re Carpenter*, 1 Kay, 418; see also *Re Probert*, 22 L. J. 948.)

2. So in the case of a partnership between two persons, who covenanted that the survivor should have the option of purchasing the share of the deceased partner in the partnership property, at a valuation, and the survivor exercised that option and paid the amount of the valuation to the executors of the deceased partner, whose share and legal estate in the freehold and copyhold estates of the partnership descended to his infant heir; the court refused to declare the infant heir a trustee for the surviving partner upon petition or motion, under this act, without suit. (*In re Burt*, 9 Hare, 289.)

3. And where an order for sale of mortgaged property was made at the suit of a mortgagee in fee, the devisee of the mortgagor being an infant, the court declined to make an order under this act vesting the infant's estate in the purchaser, such order being considered unnecessary. (*In re Williams*, 19 L. T. 152.)

Contingent rights of infant trustees and mortgagees.

VIII. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey the estate of a trustee out of the jurisdiction of the court.

IX. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order vesting such lands in such person or persons, in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*d*).

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4. *Quære*, whether under this section an order can be made to vest the legal estate to uses to bar dower. (*In re Howard*, 19 L. T. 152.) But this was done in a case before Vice-Chancellor Kindersley, who required the proposed trustee to appear and consent. (*In re Lush's Estate*, 5 De G. & S. 437, n.) So also was it done by Vice-Chancellor Stuart. (*Davey* v. *Miller*, 1 Eq. Rep. 236; 21 L. T. 192.)

5. Where a mortgagee in fee of lands in gavelkind devised his estate, the court refused an order upon petition asking that the infant heir's estate might be vested in the petitioner, holding that in consequence of the devise no estate was vested in the infant. (*In re Field's Mortgage*, 15 Jur. 1004.)

6. Where some only of a number of persons interested in the equity of redemption of copyhold lands vested in coheirs of a mortgagee, two of whom were infants, asked for a reconveyance, it was held that the court had power to make an order as prayed under the 15 & 16 Vict. c. 86, s. 51. (*In re Sharpley*, 21 L. T. 71.)

(*d*) 1. The court having declared a person a trustee, and directed him to surrender certain copyholds, but he could not be found, it was ordered, upon evidence thereof, that a person be appointed to surrender in his stead. (*In re James's Trust*, 19 L. T. 338.)

2. A mortgagor of his whole terms, except one day, gave a

Court may make order in cases where persons are seised of lands jointly with parties out of jurisdiction of court, &c.

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*e*).

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power of sale and a covenant to assign the last day to the purchaser, and being out of the jurisdiction of the court the purchaser petitioned for a vesting order, which the Lords Justices however refused, concurring in the opinion of Vice-Chancellor Wood, and dismissed the petition. (*In re Propert's Purchase*, 22 L. J. 948.)

See notes to sect. 10.

(*e*) See note 8, to sect. 32.

1. Where a settlement gave power to appoint a new trustee in the place of any trustee who should become "incapable" to act, it was held that the word "incapable" had reference to personal incapacity, and that the power could not be exercised where a trustee, having become bankrupt, had been indicted for not surrendering, and had gone abroad. *Semble*, that a vesting order under this section is inapplicable where one only of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the other trustees remaining. (*In re Watts' Settlement*, 15 Jur. 459; 17 L. T. 139; 9 Hare, 106; 20 L. J. 337.)

2. The master having found that one out of three trustees under a will had become embarrassed in circumstances, had been declared bankrupt, and had gone, and then was out of the jurisdiction of the court, an order was made under this section vesting the estate in two other trustees. (*In re Elliott's Trust*, 17 L. T. 162.)

3. In a will the words "unwilling or unable to act" were held not to apply to the case of a trustee out of the jurisdiction, and that a trustee, in that case, being abroad and his address unknown, it was necessary to apply to the court for assistance. But the court will not order a transfer to the new trustee of shares purchased with trust funds, without authority by the original trustees, as by so doing it would be sanctioning a breach of trust. (*Re Harrison's Trust*, 20 L. T. 123; 22 L. J. 69.)

Contingent rights of trustees.

XI. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the court to a contingent right in lands.

XII. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery or cannot be found, it shall be lawful for the said court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

When it is uncertain which of several trustees was the survivor.

XIII. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is uncertain whether the last trustee be living or dead.

XIV. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as

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4. The Master of the Rolls in Ireland has decided that where a new trustee is appointed in lieu of one of two trustees, such one being out of the jurisdiction, a third person should be appointed to concur with the continuing trustee, in conveying chattels real, the subject of the trust, to the new trustee and the continuing trustee, in order to prevent a severance of the joint tenancy. (*In re Darley's Trusts*, 6 Ir. Jur. 41.)

to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When trustee dies without an heir.

XV. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate (*f*).

Contingent right of unborn trustee.

XVI. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

Power to convey in place of a refusing trustee.

XVII. And be it enacted, that where any person jointly or solely seised or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, have stated in

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(*f*) Where the trustee died intestate, and his heir was not known, upon a motion by vendors and purchasers of copyholds to confirm the master's certificate, and to vest the legal estate in one of the purchasers, the lord of the manor was required to appear and consent, although the master found that a writing had been produced before him, signed by the lord of the manor, consenting to the application.

writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*g*).

Power to convey in place of person entitled to contingent right.

XVIII. And be it enacted, that where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by a person entitled to require the same, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or release such contingent right, or shall neglect or refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to

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(*g*) While this section was in operation the following points were decided in reference to it; but it is now repealed by the 2nd section of the Trustee Act Extension, page 626, *infra*.

1. A copyhold was vested in a married woman, and sold under a decree, which ordered all proper parties to join. She stated in writing that she never would surrender: Held, that the case came within this act, and the court made a vesting order. (*Rowley* v. *Adams*, 14 Beav. 130; 20 L. J. 436.)

2. The tender of a notice requiring a trustee to surrender is not sufficient, but the tender of a deed appointing an attorney to surrender may possibly be sufficient. (Ibid.)

3. Where an estate is sold in lots under a decree, one petition under this act, as to the several lots, is not multifarious; but, *quære*, whether, where a purchaser has paid his purchase money into court, the petition should be by the plaintiff or by the purchaser. The court, however, held that the objection might be removed by making them co-petitioners. (Ibid.) [But see *King* v. *Leach*, 2 Hare, 57.]

make an order releasing or disposing of such contingent right in such manner as it shall direct; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right (*h*).

Power to convey in place of mortgagee.

XIX. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found;

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person:

When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee:

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may

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(*h*) This section is repealed by the 2nd section of the Trustee Act Extension, page 626, *infra*.

be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*i*).

Power to appoint a person to convey in certain cases.

XX. And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the governor and company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed

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(*i*) This section does not apply unless the money due in respect of the mortgage has been paid to a person entitled to receive the same, and an order was refused where the mortgage monies remained unpaid. Throughout the act a mortgage is carefully distinguished from a trust. (*In re Meyrick*, 15 Jur. 505; 20 L. J. 336.)

The Lords Justices held that the court has jurisdiction under this section upon the petition of the personal representative of a mortgagee in fee, who has died intestate, as to the mortgaged premises, and whose heir cannot be found or is unknown, to vest the mortgaged estate in such representative, subject to the equity of redemption, the mortgage debt remaining unpaid. (*In re Boden's Estate*, 16 Jur. 279; 21 L. J. 316.)

more convenient, to make an order directing the secretary, deputy secretary or accountant-general for the time being of the governor and company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the governor and company of the Bank of England, and all other companies or societies, and their officers and servants, for all acts done or permitted to be done pursuant thereto.

As to lands in Lancaster and Durham.

XXI. And be it enacted, that as to any lands situated within the duchy of Lancaster or the counties palatine of Lancaster or Durham, it shall be lawful for the court of the duchy chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the court of the duchy chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagee within the meaning of this act.

When trustees of stock out of the jurisdiction.

XXII. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said court,

or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said court may appoint (*k*).

When trustee of stock refuses to transfer.

XXIII. And be it enacted, that where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person abso-

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(*k*) 1. An infant trustee of stock within the jurisdiction not being within this act, an infant sole trustee of stock out of the jurisdiction is not a sole trustee of stock out of the jurisdiction within the meaning of this section. (*Cramer* v. *Cramer*, 16 Jur. 831.) But see sect. 3 of the Trustee Act Extension, page 627, *infra*.

2. In the case of a constructive trust, it is within the discretion of the court to make an order upon petition under this act, vesting a right to transfer stock in the absence of the trustee, without requiring the trust to be previously established by a decree of the court. (*In re Angelo*, 18 L. T. 316.)

3. One of two trustees resided out of the jurisdiction, but the court refused to appoint a new trustee in his stead, under this and the 32nd sections. (*In re Mais*, 16 Jur. 608.)

4. Where property was bequeathed to A. and B. equally, and an executor and executrix appointed, the latter of whom married, and the property was laid out in stock in the names of the executor and executrix, "the wife of C.:" C., the husband, went abroad in 1839, and had not been heard of down to 1852, and it was not known whether he was alive or dead. On the petition of the executor and executrix, the Lords Justices declared C. to be a trustee within this act, and that the right to transfer was vested in the executor alone. (*In re Dennison's Trust*, 22 L. J. 180.)

5. See also notes to sect. 10.

6. The master having found that it was uncertain whether one of two trustees was living or dead, and the other trustee afterwards died, this section was held not to apply. (*Re Randall*, 1 Drewry, 401.)

lutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*l*).

When one of several trustees of stock refuses to transfer or receive and pay over dividends.

XXIV. And be it enacted, that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees (*m*).

(*l*) The surviving trustee of a sum of stock neglected for twenty-eight days after a request in writing made to him by persons duly appointed new trustees to transfer the stock to them: Held, that they were persons absolutely entitled within the meaning of the act, and ordered the same to be transferred accordingly. (*Russell's Trust*, 1 Sim. 404, N. S.)

See notes 1 and 2 to sect. 24.

A. and B. were trustees of stock for C. for life, and in a suit by C. they were directed to transfer the same into the name of the accountant-general in trust in the cause. A. refused to obey the order, and therefore the court made an order vesting the right to transfer in B. The Bank declined to comply with the order, as C. was not absolutely entitled to the stock; and upon a motion by B. that the Bank might be directed to permit the transfer, it was held that the application could not be sustained. (*Mackenzie* v. *Mackenzie*, 18 L. T. 205.) But now see sects. 6 and 7 of the Trustee Act Extension, page 628, *infra*.

(*m*) 1. This section alone (as is also the case with sect. 23) only authorizes the court to make an order on the application of the person absolutely entitled to the principal stock; but sect. 37 will assist out of the difficulty, new trustees being persons absolutely entitled within the meaning of that section. (*In re Russell's Trust*, 15 Jur. 100.)

2. Two trustees of stock refusing to pay the dividends to

When stock is standing in the name of a deceased person.

XXV. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint (*n*).

Effect of an order vesting the legal right to transfer stock.

XXVI. And be it enacted, that where any order shall have been made under any of the provisions of this act vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply

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the person entitled for life, the court on petition of the latter held, that under this and the 23rd sections it had power to make a vesting order in her favour as to the dividends already accrued, notwithstanding such refusal, but that no order could be made as to the future dividends. (*In re Hartnall's Trusts*, 21 L. J. 384.) But see sect. 4 of the subsequent act, page 627, *infra*.

(*n*) Where the administrators of a deceased trustee of stock refused to receive the dividends, the right to receive them was, on the petition of the person entitled for life, vested in that person. (*Re Hartnall's Trust*, 18 L. T. 167.)

Where the master found that it was uncertain whether one of two trustees was living or dead, and the other trustee afterwards died, it was held that the former was not a sole trustee within this act. (*Re Randall*, 1 Drewry, 401.)

with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof (*o*).

Effect of an order vesting legal right in a chose in action.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting copyhold

XXVIII. And be it enacted, that whensoever, under any of the provisions of this act, an order shall be made,

(*o*) An order under the 35th sect. only amounts to a declaration by the court that the new trustees are the proper persons to have the stock transferred to them; and therefore they cannot, under such an order and this 26th sect., require the Bank of England to transfer to them stock standing in the names of the old trustees. (*Re Smyth's Settlement*, 20 L. J. 255; 17 L. T. 71.) But now see sections 6 and 7 of the Trustee Act Extension, page 628, *infra*.

lands, or appointing any person to convey copyhold lands.

either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

When a decree is made for sale of real estate for payment of debts.

XXIX. And be it enacted, that when a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*p*).

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

XXX. And be it enacted, that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court

(*p*) See sect. 1 of the Trustee Act Extension, page 625, *infra*, and the notes thereto.

to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said court or the said Lord Chancellor might under the provisions of this act make concerning the estates, rights and interests of trustees born or unborn (*q*).

Power to make directions how the right to transfer stock to be exercised.

XXXI. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this act are enforced.

Power to court to make order appointing new trustees.

XXXII. And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable

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(*q*) Notwithstanding this section, the infant heir in a foreclosure suit is entitled to a day to show cause against the decree six months after coming of age. (*Earl of Newbury* v. *Marten*, 15 Jur. 166; 16 L. T. 482. See *Price* v. *Carver*, 3 My. & Cr. 157.)

Where a decree is made for the partition of lands in which an infant is interested, the court may declare such infant to be a trustee of the portions of the property allotted in severalty to the other parties interested. (*Bowra* v. *Whight*, 16 L. T. 550.)

Where estates are sold under a decree for payment of legacies, the party having the legal estate is a trustee under this section. (*Rowley* v. *Adams*, 15 Jur. 1002.)

so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (*r*).

(*r*) 1. Where the master, in making his certificate [see section 38] approving of trustees to be appointed in lieu of an executory trustee of a trust fund, had proceeded on an affidavit thereby stating that the trustee was unwilling to act, the court refused to make an order of appointment unless the trustee sought to be removed consented thereto, or some evidence was adduced of the circumstances under which he was unwilling to act. (*In re Nicholson's Trusts*, 17 L. T. 49; 41 L. O. 495.)

2. Where the surviving trustee of a settlement of personalty died, and his widow took out administration, with the will annexed, in Ireland, but not in England, the court, on being asked to appoint new trustees under this section, and for a vesting order under the 35th section, considered the language of the act did not confer the power to make such order, as there was no personal representative in England. (*In re the Settlement of Thomas Frost*, 16 L. T. 481.)

3. A new trustee will be appointed by the court without a reference on proof of his fitness and on his consent. (*Robinson's Trust*, 15 Jur. 187.)

4. Where the master has certified that certain parties are proper to be appointed trustees, all parties having appeared before him and consented, still, on motion to confirm the master's report, the parties must appear and consent. (*Thomas's Trust*, 15 Jur. 187.)

5. On a petition for the appointment of new trustees of a settlement, the beneficial interests under which had been made the subjects of marriage settlements, it was held that the original cestuis que trustent, their husbands and wives, and the trustees of their settlements, sufficiently represented all the parties beneficially interested. (*In re Smyth's Settlement*, 2 De G. & S. 781. See *Ellison* v. *Cookson*, 2 Coll. 52.)

6. Where a testator devised his real estate to one trustee who died intestate, the court appointed two trustees, and without a reference, there being an affidavit of fitness, and made a vesting order. (*In re Tunstall*, 15 Jur. 645.)

7. Where a trustee, a bankrupt, had not surrendered, and was proclaimed, the court refused to appoint a new trustee in his place under a power with the words "refuse or become incapable to act." (*Turner* v. *Maule*, 15 Jur. 761.)

8. When one of several trustees of real estates is out of the

XXXIII. And be it enacted, that the person or persons who, upon the making of such order as last afore- The new trustees to have the powers of trustees appointed by decree in suit.

jurisdiction, and it is desired to get another trustee appointed in his place, the proper course is not to apply for an order vesting the trust property in the new trustee and the continuing trustees, but to apply for an order appointing a proper person to concur with the continuing trustees in conveying the property so as to vest it in themselves and the new trustee. (*In re Plyer's Trust*, 15 Jur. 766.) [See sect. 10.]

9. A petition for the appointment of new trustees of a term of years should be served upon the reversioner. (*In re Farrant's Trust*, 17 L. T. 309.)

10. Where the trust deed gives power to appoint a new trustee, and the party is willing to exercise that power, this act gives no jurisdiction to the court to appoint a new trustee, nor to remove an existing trustee desirous of continuing to act. (*In re Hodgson's Settlement*, 15 Jur. 552.)

11. The Vice-Chancellor, sitting in Chancery, ordered the appointment of new trustees in the place of a bankrupt trustee, and the trust funds to be paid to such new trustees, under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 130. (*In re Heath*, 9 Hare, 616.)

12. The owner of shares in a bank, by letter from Calcutta to England, requested the manager to deliver them to the manager of another bank to which he was indebted, and to pay all dividends on them to, and to sell them on the order of, such bank. The shares were sold under this authority, and the purchaser applied for an order to vest the shares and dividends in B. to enable the purchaser to obtain a transfer from him under this act. Order made, on proof of signature of the owner to the letter, the sale, and that the debt had ever since existed and was still due. (*In re Major Angelo*, 16 Jur. 831.)

13. As to form of order appointing new trustee of copyhold estate, and appointing a person to complete the assurance of the estate to such new trustee, see *In re Hey's Will*, 9 Hare, 221.

14. Where both the trustees of a will disclaimed, the court appointed two other persons in substitution for such trustees. (*In re Tyler's Trust*, 18 L. T. 105.)

15. To enable the issuing, at the suit of new trustees appointed under this act, of an elegit on foot of a judgment, such trustees must first become parties to the record by suggestion or judgment revived in their own names. (*M'Cullogh* v. *Rodgers*, 4 Ir. Jur. 75.)

16. The court declined to appoint a new trustee of a term

said, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

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created by settlement not containing any power to appoint new trustees, the sole trustee having died, considering that this 32nd section gave no jurisdiction in such a case, and that the words "if any" in the 34th section did not enlarge the 32nd section. (*In re Hazeldine*, 16 Jur. 853.) But see the power now conferred by the 9th section of the Trustee Act Extension, page 629, *infra*.

17. A certificate of the master on a reference under this act must be confirmed, and the consequential directions given on motion. (*In re Evans's Settlement*, 19 L. T. 9.)

18. The Lord Chancellor decided that a petition for the appointment of new trustees of a municipal charity, if entitled under this act, may be heard by the Master of the Rolls or one of the Vice-Chancellors. (*In re the Northampton Charities*, 20 L. T. 186; 17 Jur. 6; 22 L. J. 611.)

19. This act does not empower the court to appoint new trustees of charity property without the consent of the attorney-general, whose fiat is necessary before presenting the petition. (*In re Rolle's Charity*, 22 L. J. 760.)

20. Where one of two trustees resides out of the jurisdiction, see note 3 to sect. 22.

21. In the case of a charity, where the class from which new trustees were to be elected was prescribed by the old deed, but not the persons who were to elect, or the manner of election, the court made a vesting order, and inserted a direction that, whenever the trustees should be reduced to a certain number, the remaining trustees should apply at chambers, upon notice to the attorney-general, for an appointment of new trustees. (*Re the Townlands of East Berghott*, 2 Eq. Rep. 90.)

22. The court has authority to make a vesting order where there is nothing to prevent a conveyance to the trustees appointed by the court. (*Re Manning*, 1 Kay, App., 28.)

23. In appointing new trustees the court is not limited to the number originally nominated. (*Plenty* v. *West*, 16 Beav. 356. See also *Birch* v. *Cropper*, 2 De G. & S. 255.) And when three trustees were named in a settlement with power to nominate, substitute or appoint any person or persons in the place of the then present or other trustee or trustees who should die, &c., it was held that an appointment of two only in place of the three was a valid appointment. (*Re Bathurst's Estate and The South Wales Railway Company*, 2 Sm. & G. 169.)

Power to court to vest lands in new trustees.

XXXIV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any lands subject to the trusts shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate (*s*).

Power to court to vest right to sue at law in new trustees.

XXXV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (*t*).

Old trustees not to be discharged from liability.

XXXVI. And be it enacted, that any such appointment by the court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

XXXVII. And be it enacted, that an order under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action, subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage (*u*).

(*s*) See notes 6 and 8 to sect. 32.

(*t*) See note 2 to sect. 32, and note to sect. 26.

(*u*) 1. Trustees are persons absolutely entitled within the meaning of this section. (*In re Russell's Trust*, 15 Jur. 100.)

Power to go before the master in the first instance.

XXXVIII. And be it enacted, that when any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the Lord Chancellor, intrusted as aforesaid, or from the Court of Chancery, it shall be lawful for him to exhibit before any one of the masters of the High Court of Chancery a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate (*x*).

Power to petition the court or the Lord Chancellor.

XXXIX. And be it enacted, that any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as such person may deem himself entitled to upon the facts found by the master.

Power to present petition in the first instance.

XL. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, entrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such peti-

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2. When a tenant for life petitions for a vesting order, the cestuis que trustent interested in the fund should be before the court. (*In re Prescott's Trust*, 19 L. T. 371.)

3. Where real estate was devised to trustees upon trust for A. B. for life, and afterwards for her children equally, and if A. B. died without leaving a child, for the testator's right heirs: in a suit, part of the real estate was sold, and the purchase-money was paid into court; and the trustees being dead, the two infant children of A. B. petitioned that the estate might be vested in the purchaser, or that a proper person might be appointed to convey; but the court dismissed the petition, the petitioners not being constructive trustees. (*Weston* v. *Filer*, 19 L. T. 243.)

(*x*) See notes 1 and 4 to sect. 32, and note to sect. 41.

tion before the said court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof (*y*).

What may be done upon petition.

XLI. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said court or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said court or for the said Lord Chancellor to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss petition with or without costs.

XLII. And be it enacted, that upon the hearing of any such motion or petition, whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act.

Power to make an order in a cause.

XLIII. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such court

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(*y*) See note 3 to sect. 17.

Where A. B., having surrendered copyholds to C. D. upon trust to sell, the receipts of C. D., his executors, administrators or assigns to be good discharges to purchasers, died, and C. D. died intestate, and his administrators contracted to sell the estate to E. F., and his heir-at-law was an infant, upon a petition by the administrator and the purchaser for the appointment of a person to convey in place of the infant, it was held unnecessary to serve the representatives of A. B. with the petition. (*Ex parte Wise*, 19 L. T. 44.)

Primâ facie, all parties interested should receive notice, but when that is impracticable, a case should be made for proceeding as to particular parties without notice. (*In re Richard's Estate*, 19 L. T. 244.)

to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this act (*a*).

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

XLIV. And be it enacted, that whenever any order shall be made under this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order; provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this act, when the same shall appear to have been improperly obtained.

Trustees of charities.

XLV. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether

(*a*) See note 3 to sect. 17.

such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said court under any statute authorizing the said court to make an order to that effect in a summary way upon petition (*b*).

No escheat of property held upon trust or mortgage.

XLVI. And be it enacted, that no lands, stock or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.

Act not to prevent escheat or forfeiture of beneficial interest.

XLVII. And be it enacted, that nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

Money of infants and persons of unsound mind to be paid into court.

XLVIII. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock or chose in action conveyed, assigned or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the accountant-general, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said court; and it shall be lawful for the said court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for

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(*b*) See notes 17 and 18 to sect. 32.

such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a decree in the absence of a trustee.

XLIX. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the court, and that he cannot be found, it shall be lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: provided always, that no such decree shall bind, affect or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors or administrators, for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

Powers of the master.

L. And be it enacted, that when any person shall, under the provisions of this act, apply to one of the masters of the Court of Chancery in the first instance, and adduce evidence for the purpose of obtaining the certificate of such master as a foundation for an order of the said Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, it shall be lawful for the said master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the master under this act shall be enforced by the same process as orders of the court made in any suit against a party thereto.

Costs may be paid out of the estate.

LI. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal

estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or court shall think proper (*c*).

Commission concerning person of unsound mind.

LII. And be it enacted, that upon any petition being presented under this act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Suit may be directed.

LIII. And be it enacted, that upon any petition under this act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose (*d*).

Powers of Court of Chancery to extend to property in the colonies.

LIV. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations and colonies belonging to her Majesty (except Scotland).

Powers given to Court of Chancery

LV. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England

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(*c*) The court has no power to order under this section payment of costs of proceedings under the 1 Will. 4, c. 60. See note 2 to sect. 3.

The costs of a petition under this act were ordered to be a charge on the real estate, with interest at £4 per cent. (*In re Davies*, 18 L. T. 253.)

The general rule is, that where a mortgage is in a lunatic trustee the mortgagor must pay the increased expenses arising therefrom. (See *In re Lewis*, 1 M'N. & G. 23; *In re Townsend*, ib. 686.) But the committee of the lunatic mortgagee and the mortgagor having joined in a petition for a vesting order on paying the money into court, the court followed the practice of Lord Eldon in *Ex parte Richards*, 1 Jac. & W. 264, and ordered the costs of the petition to be borne by the lunatic's estate. (*In re Wheeler*, 1 De G. M. & G. 434.)

(*d*) See note 8 to sect. 3, and notes 1 and 2 to sect. 7.

may be exercised by that Court in Ireland.

shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

Powers of Lord Chancellor in lunacy to extend to property in the colonies.

LVI. And be it enacted, that the powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations and colonies belonging to her Majesty (except Scotland and Ireland).

Powers of Lord Chancellor in lunacy may be exercised by Lord Chancellor of Ireland.

LVII. And be it enacted, that the powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

Short title.

LVIII. And be it enacted, that in citing this act in other acts of parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression, "The Trustee Act, 1850."

Commencement of act.

LIX. And be it enacted, that this act shall come into operation on the first day of November, one thousand eight hundred and fifty.

Act may be amended, &c.

LX. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

THE TRUSTEE ACT EXTENSION, 1852,

AND

DECISIONS THEREUNDER.

15 & 16 Vict. c. 55.

An Act to extend the Provisions of "The Trustee Act, 1850." [30th June, 1852.]

Whereas it is expedient to extend the provisions of the Trustee Act, 1850: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same,

Court of Chancery may make an order for vesting the estate, in lieu of conveyance by a party to the suit after a decree or order for sale.

I. That when any decree or order shall have been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser or in such other person as the court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly exe-

cuted all proper conveyances and assignments of such lands for such estate (*e*).

Power to make an order for vesting the estate, on refusal or neglect of a trustee to convey or release.

II. That sections numbered 17 and 18 in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the

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(*e*) 1. The vendors and purchasers of several lots may join in a petition for a vesting order under this section, and if the purchaser of any lot will not join therein, but appears separately, he will have to bear his own costs. (*Rowley* v. *Adams*, 24th July, 1852.) But see *Ayles* v. *Cox*, 22 L. T. 232, where it was held that a petition for a vesting order might be presented by each purchaser, and that the costs were payable by the vendors.

2. In another unreported case the court made an order under this section in an administration suit, vesting in a purchaser part of the estate which had been settled on persons parties to the cause, and who refused to convey. (*Timmis* v. *Brassey*, 30th July, 1852.)

3. The Vice-Chancellor Parker used to consider that vesting orders ought not to be made, except in cases where there would be inconvenience in obtaining a conveyance, and mere expense was not in his opinion such an inconvenience.

4. The Vice-Chancellor Stuart held that the court had power under this act, and the former act taken together, to vest in a purchaser, so as to bind the contingent interests of persons not in esse, an estate directed to be sold by decree made before 1852, although the purpose of the decree was not confined to payments of debts, and consequently not within the 29th section of the Trustee Act, 1850. (*Wake* v. *Wake*, 21 L. T. 57; 17 Jur. 545.)

said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (*f*).

Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee.

III. That when any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said court may appoint (*g*).

On neglect to transfer stock for twenty-eight days, order may be made vesting right to transfer in such person as the court shall appoint.

IV. That where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*h*).

On like neglect by executor, similar order may be made.

V. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that

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(*f*) For points decided under the 17th sect. of the previous act, now repealed by this section, see page 604, *ante*.

A decree ordered a peer to execute a certain deed to secure to his wife a rent-charge, to which she had established her right against him in the suit, and of which he was declared a trustee for her; upon his refusal, the Court of Appeal, on petition, appointed a person to execute the deed for him. (*Mornington* v. *Mornington*, 1 Eq. Rep. 369; 22 L. J. 966.)

(*g*) See note 1 to sect. 22 of the former act, page 608, *ante*.

(*h*) See note 2 to sect. 24 of the former act, page 609, *ante*.

purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint.

Bank of England and companies to comply with such orders.

VI. When any order, being or purporting to be under this act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Indemnity to Bank and companies so obeying.

VII. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person, to inquire concerning the propriety of such order, or whether the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, had jurisdiction to make the same.

Power to appoint new trustees in lieu of persons convicted of felony.

VIII. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any

person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same.

Power to the court to appoint new trustees where there is no existing trustee.

IX. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order (*i*).

Chancellor may make orders for appointment of trustees, without it being necessary that it should be made in Chancery, &c.

X. In every case in which the Lord Chancellor intrusted as aforesaid has jurisdiction under this act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in chancery as well as in lunacy, or be passed and entered by the registrar of the Court of Chancery.

As to powers of persons intrusted with the care of lunatics.

XI. That all the jurisdiction conferred by this act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised and performed by the person or persons for the time being intrusted as aforesaid (*k*).

Act to be construed as part of Trustee Act, 1850.

XII. That this act shall be read and construed according to the definitions and interpretations contained in the 2nd section of the Trustee Act, 1850, and the provisions of the said last-mentioned act (except so far as the same are altered by or inconsistent with this act) shall extend and apply to the cases provided for by this act, in the same way as if this act had been incorporated with and had formed part of the said Trustee Act, 1850.

All orders made under Trustee Act,

XIII. That every order to be made under the Trustee Act, 1850, or this act, which shall have the effect of a

(*i*) See note 16 to sect. 32 of former act, page 615, *ante*.
(*k*) See note 6 to sect. 3 of the former act, page 597, *ante*.

1850, or this act to be chargeable with the same stamp duty as deeds of conveyance.

conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

THE TRUSTEES' RELIEF ACTS,

AND

ORDERS AND DECISIONS THEREUNDER.

10 & 11 VICT. c. 96.

An Act for better securing Trust Funds, and for the Relief of Trustees. [22nd July, 1847.]

Whereas it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all trustees, executors, administrators or other persons having in their hands any monies belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit (*l*)

Trustees may pay trust monies or transfer stocks and securities into the Court of Chancery.

(*l*) As to title, form and contents of affidavit required, see also the 1st and 8th of the General Orders of the 10th June, 1848, pages 639, 640; and the G. O. of the 7th May, 1852, page 640.

Where executors paid money into court under this act to an account headed, "In the Matter of the Trusts of the Will of S. Y.," the court held that the account was too general to

shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the accountant-general of the high Court of Chancery, into the Bank of England, to the account of such accountant-general in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said court; and that all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of England or of the East India Company or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons of

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enable it to act under this statute. (*In re Joseph's Will*, 11 Beav. 625.) [See there also observations as to the effect of this act, and the proper mode of proceeding under it.] To enable the court to distribute the fund it must stand to an account which separates it from the other assets and disconnects it from all the other trusts of the will. (*In re Everett*, 12 Beav. 485.) Therefore, upon a petition for distribution of a fund representing a testator's residuary estate, subject to two legacies, the fund having been paid into court by the executors, the court declined to make the order, and directed the petition to stand over with leave to file a claim for administration. (*In re Masselin*, 17 L. T. 150.)

So when money is paid in "upon the trusts of a will," it involves the general administration of the estate, and the court will not order it to be transferred to a particular account, except at the request and on the responsibility of the trustee. (*In re Wright*, 18 L. T. 268.)

The affidavit upon which the money is paid in must in all cases set forth a succinct account of the trustee's reasons for paying it in, at the peril of costs. (*Ex parte Hillas*, 6 Ir. Jur. 26.)

A trustee, desiring to avail himself of this act, asked for an order on the accountant-general, to allow a sum of trust money to be paid into the bank in his name; but the Master of the Rolls declined to make any order, as his impression was that the accountant-general would receive the money without one. (*In re Biggs*, 11 Beav. 27; 11 Jur. 958.)

Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the accountant-general under this act. (*In re Parry*, 6 Hare, 306; 12 Jur. 721.)

whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said accountant-general, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said court; and in every such case the receipt of one of the cashiers of the said bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited (*m*) (*n*).

Receipt of Bank cashier, or certificate of proper officer, to be sufficient discharge.

II. And be it enacted, that such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks or securities so paid in, transferred and deposited as aforesaid, and for the investment and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties, as to the court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted (*o*).

Court of Chancery to make orders on petition, without bill, for application of trust monies and administration of trust.

(*m*) See the subsequent act, page 637, and the 2nd G. O. of the 10th June, 1848, page 639; and as to investment, the 4th ibid., page 639, and the G. O. of the 7th May, 1852, page 640.

(*n*) As to notice to be given by trustee, see 3rd G. O. of the 10th June, 1848, page 639.

(*o*) As to payment out of court, or distribution, see also 4th, 5th, 6th, 7th, and 8th G. O. of the 10th June, 1848, pages

III. Provided always, and be it enacted, that the additional remuneration which the said accountant-general Regulating salary of accountant-general.

639, 640; as to titles of petitions and affidavits, see 8th ibid., page 640.

The application to transfer stock brought into court under this act, in trust in a cause, must be by petition. (*In re Masselin's Trust, Harrison* v. *Masselin*, 18 L. T. 106.)

Where the right to receive the stock out of court depended on the fact of there having been no issue of the petitioner's marriage, although the petition was supported by affidavits, the court required the fact to be found by the master before ordering payment. (*In re Wood's Settlement*, 15 Sim. 469.)

A married woman with a general power of appointment over a reversionary trust fund, appointed it, by way of mortgage, with power of sale, under which it was sold. Her husband became bankrupt, and after the determination of the life estate the trustees paid the fund into court under this act; the purchasers then petitioned for a transfer to them, and served the trustees only. Ordered, subject to a direction not to draw up the order for a fortnight, and to serve the husband's assignees with notice that the fund would be transferred, if no objection were made within that period. (*Ex parte Stutely*, 1 De G. & S. 703.)

Where money is paid into court by trustees under this act, the court may either adjudicate upon the matter upon petition and affidavits, or may direct a bill to be filed, if the complexity of the case require a more formal proceeding. (*In re Bloye's Trust*, 19 L. J. 89; 1 M'N. & G. 488; 2 Hall & T. 140; 14 Jur. 49.) The Lord Chancellor, in giving judgment in this case, made observations favourable to the act as to its object and operation.

A petition was presented by a party claiming the fund in court, and served on another party who claimed the fund for himself, and it having been agreed between them that the case should be treated as if a petition had been presented by each, the Vice-Chancellor of England ordered the fund to be paid to the actual petitioner; but the Lord Chancellor, reversing that decision, ordered it to be brought back into court, accompanied by a declaration negativing the title of the petitioner to whom it had been paid. (*In re Lorimer*, 19 L. J. 524.)

An executor paid money into court believing it to be clear residue, but debts were afterwards discovered to be due from the estate. On petition, and by consent of the parties beneficially interested, money to the amount required was ordered to be paid out to the executor, he undertaking to apply it

may receive in consequence of the operation of this act shall not have the effect of giving to him any claim for a

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according to the trusts of the will. (*Ex parte Tournay*, 14 Jur. 263; 19 L. J. 257.)

A trustee should pay in the whole of the trust fund, and not retain a small sum out of it. *Mitchell et uxor.* v. *Cobb*, 17 L. T. 25.)

Guardians of the poor petitioned for payment to them, out of a fund paid in by the trustees in which a lunatic was interested, of sums expended by them in his support, and the Lord Chancellor made the order, holding that the act placed the court in the position of the trustees, who might have made the payment under the 7 & 8 Vict. c. 101, s. 27. (*In re Upfall's Trust*, 3 M'N. & G. 281.)

A diocesan probate only having been taken out, the Court of Appeal held that, under the circumstances, the rule of the accountant-general requiring prerogative probate before paying the money out, should be relaxed. (*In re Knowles*, 18 L. T. 104.)

Where a portion of a trust fund is paid in under this act, the original jurisdiction of the court by bill is gone, as to the money so paid in, and the remedy of the cestui que trust can only be prosecuted under the provisions of this act. (*Goode* v. *West*, 15 Jur. 1025.)

The Vice-Chancellors have jurisdiction to interfere in the matter of a person of unsound mind. (*In re Weldon*, 18 L. T. 85.)

A declaration by the Lord Chancellor made on petition under this act, that a deed of sale was invalid and could not stand, was held by the House of Lords to be good in point of form. (*Lewis* v. *Hillman*, 19 L. T. 329.)

The petitioners being held not entitled on the true construction of a will, the petition was allowed to be amended, by adding a prayer for a declaration of the rights of all parties and payment accordingly; and, subject to such amendment, an order was made containing the declaration and for payment to the parties accordingly. (*In re Walker*, 16 Jur. 1154.)

A purchaser of an estate expressly subject to legacies charged thereon by will, is not a trustee within the meaning of this act; and having paid the money into court under the act, and petitioned for its investment, or for repayment to the petitioners, the money was ordered to be paid to the petitioners, who were to pay the respondent's costs. (*In re Buckley*, 1 Eq. Rep. 18; 21 L. T. 71.)

Upon a written and reasonable application from claimants

larger income by way of salary or otherwise, in the event of the said office of accountant-general being hereafter

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residing abroad, the court will postpone the drawing up of an order for payment of the money out of court. (*In re Hodson*, 22 L. J. 1055.)

Where a sum of money distributable in shares is paid into court under this act, a petition for payment out of some of the shares should ask that the other shares may be carried to separate accounts. (*In re Hawkes*, 18 Jur. 33.)

Where a testator bequeathed stock for A. for life, with a direction that after her death it should fall into the residue, and A. and her husband assigned her life interest, and the stock was transferred into court under this act; on petition by the assignee for payment of dividends and costs, the residuary legatees not being served, it was held that he was not entitled to the costs of the petition out of the capital. (*Ex parte Peart*, 17 L. J. 168.)

And where a testator bequeathed a fund to his wife for life, with remainders over, and it was paid into court under this act; on petition by the wife for payment of the dividends, not served on any persons claiming under the will, the court refused the costs out of the capital. *Ex parte Fletcher*, 17 L. J. 169.)

Trustees of a will paid funds into court under this act, to which six legatees were entitled, and two only of the six petitioned for a reference to the master to prove their title to two sixth parts, and for payment out of such shares; the court ordered accordingly, the petitioners undertaking to pay the costs incurred thereby, the order being without prejudice to the rights of the two legatees to institute any suit against the trustees in respect of their interests under the will. The costs were however reserved. (*In re Sharpe*, 17 L. J. 395; 15 Sim. 470; 12 Jur. 492.)

A petition for payment out of court being served on a party who did not appear on the petition to have any claim, but had sent notice of a claim, but now disclaiming, she was not allowed her costs. (*In re Parry's Trust*, 12 Jur. 615.)

Where a legacy of 1000*l.*, bequeathed upon certain trusts, had been paid into court under this act, the trustees were allowed their costs out of the fund, but no other costs were given, and the costs incurred by the executor in and incidental to the payment of the legacy and interest into court were held to be payable out of the testatrix's estate. (*In re Cawthorne*, 12 Beav. 56; 18 L. J. 116.)

Upon a petition for payment out of court of a particular legacy paid in under this act, the court has no jurisdiction to

regulated by competent authority, than would have been assigned to him if this act had not been passed.

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order payment of any of the costs in the matter out of the testator's general residuary estate, but the costs must come out of the particular fund. (*In re Bartholomew's Will*, 13 Jur. 380.) In this case the Vice-Chancellor commented on the injustice of the act in reference to costs. But see the Lord Chancellor's observations vindicating the act, in the case of *Bloye's Trust*, cited *ante*, page 631.

This act does not provide any special means for making the subject of inquiry costs which trustees may deduct before paying money into court. (*In re Lorimer*, 19 L. J. 524.)

Trustees are not bound to take any trouble in ascertaining the validity of claims upon the trust fund, but, the parties disagreeing upon the subject, the trustees may discharge themselves of all responsibility whenever they please by paying the money into court, and, upon a petition for payment out, are entitled to their costs. (*In re Croyden's Trust*, 19 L. J. 172; 14 Jur. 54.)

When a trustee has funds to administer, it is his right to pay them into court under this act, without regard to the effect of that course on the liability of other parties as to costs. (*In re Mussenden*, 4 Ir. Jur. 389.)

Executors having notice that a bill was about to be filed against them by a person entitled to a share of residue, charging them with breaches of trust, paid money into court under this act as the share of that person. The bill was afterwards filed, and, on petition by the person entitled for payment out of court, the executors were not allowed their costs. (*In re Waring*, 16 Jur. 652.)

Trustees who paid a fund into court after bill filed against them by a cestui que trust, instead of paying it into court to the credit of the cause, were ordered to pay the costs occasioned by so doing.

Certain lapsed shares of a fund paid in, falling to the residuary legatees, the other shares were ordered to be paid in full, and the costs of all parties to be paid out of the lapsed shares. (*In re Ham*, 15 Jur. 1121.)

In the case of a fund the subject of successive beneficial interests, the costs of the trustees in proceeding under this act are payable out of the corpus, not out of the income. (*In re Staple's Settlement*, 13 Jur. 273.)

A tenant for life petitioned for payment of the dividends to her, and, the general personal estate being exhausted, the costs of the petition were ordered to be paid out of the income, and not out of the principal. (*In re Lorimer*, 19 L. J. 524.)

IV. And be it enacted, that the Lord Chancellor, with the assistance of the Master of the Rolls or of one of the Vice-Chancellors, shall have power and is hereby authorized to make such orders as from time to time shall seem necessary for better carrying the provisions of this act into effect. Lord Chancellor and Master of the Rolls, &c. may make general orders.

V. And be it enacted, that in the construction of this act the expression "the Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper and Lords Commissioners for the custody of the great seal of Great Britain for the time being. Construction of expression "Lord Chancellor."

VI. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament. Act may be amended, &c.

12 & 13 VICT. c. 74.

An Act for the further Relief of Trustees.

[28th July, 1849.]

Whereas difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an act passed in the session of parliament holden in the tenth and eleventh years of the reign of her present Majesty, intituled "An Act for better securing Trust Funds, and for the Relief of Trustees," and it is expedient to make further provision for carrying into effect the objects of the said recited act; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice 10 & 11 Vict. c. 96.

So also in *Re Bangley's Trust*, 19 L. T. 269, it was stated that the costs of a tenant for life should not be paid out of the corpus. But the Master of the Rolls held the reverse of this in *Re Field*, 19 L. T. 253.

A tenant for life, under his father's will, petitioned on the usual affidavit for leave to present a petition in formâ pauperis for the investment of a fund which had been paid in under this act, and for payment of the dividends to him for life, and the court made the order. (*In re Money*, 41 L. O. 118.)

Where a fund had been paid into court, the life interest in which had been assigned, and a doubt arose whether the tenant for life was deprived of the power to alienate, on a petition by the assignee, the court ordered the dividends to be paid to him during the life of the tenant for life, and the costs of all parties, except the tenant for life, to be paid out of the fund. (*In re Ross's Trust*, 15 Jur. 241.)

and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that if, upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said act, it shall appear to the judge of the Court of Chancery before whom such petition shall be heard that any monies, annuities, stocks or securities are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited act, and that the major part of such persons are desirous of transferring, paying or delivering the same to the accountant-general of the High Court of Chancery under the provisions of the said recited act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such monies or government or parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such judge as aforesaid to make such order for the payment or delivery of such monies, government or parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said accountant-general as to the said judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order.

Court of Chancery may, upon application by majority of trustees, &c. order payment or transfer of trust monies, stocks or securities into Court of Chancery.

Act may be amended, &c.

2. And be it enacted, that this act may be amended or repealed in the present session of parliament.

GENERAL ORDERS ISSUED IN PURSUANCE OF THE FIRST OF THE TWO FOREGOING TRUSTEES RELIEF ACTS.

General Orders of the 10th day of June, 1848.

1. Any trustee, desiring to pay money or transfer stock or securities into the name of the accountant-general of the Court of Chancery under the said act, is to file an affidavit, intituled in the matter of the act and of the trust, and setting forth:—

1. His own name and address.
2. The place where he is to be served with any petition or any notice of any proceeding or order of the court relating to the trust fund.
3. The amount of stock, securities or money which he proposes to deposit, or to transfer, or to pay into court, to the credit of the trust.
4. A short description of the trust and of the instrument creating it.
5. The names of the parties interested in or entitled to the fund to the best of the knowledge and belief of the trustee.
6. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities or money transferred, deposited or paid in under the act, as the court may think proper to make or direct.

2. The accountant-general, on production of an office copy of the affidavit, is to give the necessary directions for transfer, deposit or payment, and to place the stock, securities or money to the account of the particular trust; and such transfer, deposit or payment is to be certified in the usual manner.

3. The trustee, having made the payment, transfer or deposit, is forthwith to give notice thereof to the several persons named in his affidavit as interested in or entitled to the fund.

4. Such persons, or any of them, or the trustee, may apply by petition as occasion may require respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

5. The trustee is to be served with notice of any application made to the court respecting the fund, or the di-

vidends or interest thereof, by any party interested therein or entitled thereto.

6. The parties interested in or entitled to the fund are to be served with notice of any application made to the court by the trustee respecting the fund in court, or the interest or dividends thereof.

7. No petition is to be set down to be heard until the petitioner has first named a place where he may be served with any petition or notice of any proceeding or order of the court relating to the trust fund.

8. Petitions presented and affidavits filed under the said act are to be entitled in the matter of the said act (10 & 11 Vict. c. 96), and in the matter of the particular trust (*a*).

General Order of the 7th day of May, 1852.

Where any trustee desiring to pay money or transfer stock or securities into the name of the accountant-general of the Court of Chancery, under the said act, is under a general order of the said court, dated the tenth day of June, one thousand eight hundred and forty-eight, directed to file an affidavit intituled in the matter of the act and of the trust, setting forth certain matters and things in the said order of court specified and declared, in future, such affidavit in every case, where the parties deem it unnecessary to have the money, or the dividends, or interest of stock or securities invested in the meantime, shall further contain a statement to that effect; and if the affidavit shall contain no such statement, the accountant-general shall be at liberty to invest, as soon as

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(*a*) Petitions should also state in terms the affidavit made on payment of the money into court. (*In re Levett's Trust*, 19 L. T. 244; *In re Flack's Will*, 10 Hare, App., 30.) They must set out enough of the affidavit to show the difficulty which occasioned the payment into court, and who are the parties that claim or are interested in the fund, but not necessarily all the details of the affidavit. (*In re Courtois' Trust*, 10 Hare, App., 64.)

If the money paid in is a charity legacy, the certificate of the commissioners under the Charitable Trusts Act, 1853, must be obtained before the petition will be acted on by the court. (*Re Markwell*, 23 L. J. 502.)

conveniently may be, the said cash in Bank Three Pounds per Cent. Annuities in the matter of the particular trust, or, in cases of dividends or interest on stock or securities transferred, such dividends or interest in the like stock, and all accumulations of the dividends of the stock in which such cash shall be invested, and of the dividends or interest on such stock or securities as aforesaid, from time to time, in the like matter, without any special order made by the court in that behalf, and without any formal request for that purpose. And the accountant-general is to declare the trust thereof when purchased, subject to the order of this court. And, for the purposes aforesaid, the accountant-general is to draw on the Bank, according to the form prescribed by the act of parliament and the general rules and orders of this court in that case made and provided.

Provided always, that if at any time a request in writing, by or on behalf of any party claiming to be entitled, that such investment be discontinued, shall be left with the accountant-general, he shall be at liberty to cease making any further investment in the matter of the particular trust until the court shall have made some order in that behalf.

ST. LEONARDS, C.
JOHN ROMILLY, M.R.

THE CHARITABLE TRUSTS ACT, 1853,

AND

ORDERS AND DECISIONS THEREUNDER.

16 & 17 VICT. c. 137.

An Act for the better Administration of Charitable Trusts. [20th August, 1853.]

Whereas it is expedient to provide means for securing the due administration of charitable trusts, and for the more beneficial application of charitable funds in certain cases: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Her Majesty empowered to appoint charity commissioners, secretary and inspectors.

I. It shall be lawful for her Majesty and her successors, by warrant under the royal sign manual, to appoint four commissioners, and also one secretary and two inspectors for the purposes of this act, and upon any vacancy by the death, resignation or removal of any commissioner, secretary or inspector under this act, from time to time in like manner to appoint another person to succeed to such vacancy, and until a fresh appointment shall be made it shall be lawful for the surviving or continuing commissioners, in case of any vacancy, to act as if no such vacancy had occurred; and three of the said commissioners shall hold office during good behaviour; and the fourth, and every secretary and inspector to be appointed under this act, shall hold office during the pleasure of her Majesty.

Qualification of commissioners.

II. The said three commissioners so holding office during good behaviour shall be paid as hereinafter mentioned, and two at least of the said paid commissioners for the time being shall be barristers at law of not less than twelve years standing at the time of their respective ap-

pointments, and one of such barristers shall be the chief commissioner, and shall be so called and distinguished in his appointment.

Officers of the board.

III. The said commissioners, with the sanction of the Commissioners of her Majesty's Treasury, shall from time to time appoint such clerks and messengers as the said commissioners may think fit, and all persons appointed under this provision shall hold their offices during the pleasure of the said commissioners.

Salaries.

IV. There shall be paid to the said paid commissioners, and to the said secretary, inspectors, clerks and messengers such salaries not exceeding for the chief commissioner the annual sum of 1,500*l.* and for each of the other paid commissioners the annual sum of 1,200*l.*, and for the said secretary the annual sum of 600*l.*, and for each of the said inspectors the annual sum of 800*l.*, as shall be from time to time allowed by the Commissioners of her Majesty's treasury, who may also allow to every commissioner, inspector and other person appointed for the purposes of this act such reasonable travelling and other expenses as may be incurred by him in the execution of his office; and the said salaries and expenses, and the incidental expenses of the said board, shall be paid out of any monies which may be from time to time provided by parliament for that purpose; provided always, that after the 31st day of March, 1857, the said annual salary shall be paid to one only of the said commissioners besides the said chief commissioner.

No paid commissioner, secretary or inspector to sit in House of Commons.

V. No paid commissioner, secretary or inspector to be appointed under this act shall be capable of sitting in the House of Commons during the tenure of his office.

Style of commissioners, who may sit as a board.

VI. The said commissioners to be appointed under this act shall be styled "The Charity Commissioners for England and Wales," and may have and use a seal for authenticating documents, and such commissioners shall sit from time to time as a board for carrying this act into execution; and any two of such commissioners may form a board, and may exercise all or any of the powers conferred on the commissioners or the board by this act.

Board to frame general minutes.

VII. The said board shall, by general minutes, from time to time prescribe regulations for their proceedings, and the proceedings of their inspectors, and concerning the form and manner of applications to the said board, and the conditions to be performed by applicants, and for

the guidance of applicants in relation thereto, and all such general minutes shall be signed by three of the said commissioners at the least; and copies of all such general minutes shall be laid before both Houses of Parliament within fourteen days after the making thereof if parliament be sitting, or if parliament be not sitting, then within fourteen days after the next meeting thereof (*a*).

Minutes of proceedings and orders, &c. to be entered, and copies of entries signed by the secretary to be received in evidence.

VIII. The said board shall cause minutes of their proceedings, and all orders, certificates, and schemes made or approved by them under this act, to be entered in books to be provided and kept for such purpose, and all such entries shall be signed by their secretary; and all copies purporting to be extracted from the books of the said board, and to be certified by their secretary, of any such minutes, orders, certificates and schemes entered as aforesaid, shall be received as evidence of the proceedings to which such minutes shall relate, and of such orders, certificates or schemes, and of the making or approval thereof (as the case may require) by the said board, without further proof thereof.

Board to inquire into condition and management of charities.

IX. It shall be lawful for the said board from time to time, as they in their discretion may see fit, to examine and inquire into all or any charities in England or Wales, and the nature and objects, administration, management, and results thereof, and the value, condition, management and application of the estates, funds, property and income belonging thereto; and the said board may cause examinations and inquiries in relation to the matters aforesaid to be made and prosecuted by their inspectors, acting together or separately, in such cases and at such times as the said board may think fit; and all such inspectors shall from time to time report their proceedings to the said board.

Power to require accounts and statements.

X. The said board may require all trustees or persons acting or having any concern in the management or administration of any charity, or the estates, funds or property thereof, to render to the said board, or to their inspectors, or either of them, accounts and statements in writing in relation to such charity, or the funds, estates, property, income or monies thereof, or the administration, management and application thereof, and may also require such trustees and persons to return answers in

(*a*) See Minutes, Regulations, Instructions and Forms appended to the Commissioners' First Report, page 685, *infra*.

writing to any questions or inquiries addressed to them by the direction of the said board relating to the matters aforesaid.

Officers having custody of records to furnish copies and extracts, if required by board.

XI. All officers having the custody of enrolments, decrees, reports, records, and other documents relating to or concerning any charity shall furnish such copies or extracts as shall be required by the said board; and every inspector, secretary and other officer of the said board for the time being employed for the purposes of this act shall be at liberty, by the authority and under the directions of the board, and, subject to such regulations as the board may make in that behalf, to examine and search the registers and records of every court of law and equity, and every ecclesiastical court, and every public registry and office of records, and to take copies of and extracts from any decree or document recorded or registered or deposited therein respectively, for any purpose contemplated by this act, without fee or other payment in respect thereof.

Inspector may examine witnesses on oath.

XII. Any inspector acting under the authority of the said board may, by precept under his hand, subject to such regulations as the said board may make in that behalf, require any person, being a trustee of any charity or otherwise acting or having any concern in the management or administration of any charity, or of the estates, funds or property thereof, or in the receipt or payment of the income or monies thereof, or deriving any income or stipend therefrom, to attend before such inspector for the purpose of being examined by him touching or relating to such charity, or the estates, funds, property, or income thereof, at any time and place mentioned or appointed by such precept, and to bring and produce any deed, paper, writing, instrument or other document, being in the custody, possession, or power of such person, and relating to such charity, or the estates, funds, property, or income thereof, and may examine upon oath all persons attending in pursuance of such precept, and all persons voluntarily attending before him, and may administer such oath; provided always, that no person shall be obliged to travel in obedience to any such precept more than ten miles from his place of abode.

Persons giving false evidence guilty of a misdemeanor.

XIII. If any person wilfully give false evidence upon any examination under this act, every person so offending shall be deemed guilty of a misdemeanor.

Person refusing to render accounts, &c. to be deemed guilty of a contempt of court.

XIV. If any person from whom the said board, or any inspector, is authorized to require any account or statement or answers to any questions or inquiries, or whose attendance any inspector is authorized to require, shall refuse or wilfully neglect to render to the said board such account or statement, or to make answers to such questions or inquiries, or to attend in obedience to any lawful precept of any inspector or to give evidence before him, or shall wilfully alter, destroy, withhold or refuse to produce any deed, paper, writing, instrument or other document which may be lawfully required to be produced before any inspector or the said board, every person so offending shall be deemed and taken to have been guilty of a contempt of the High Court of Chancery, and shall be liable to be attached and committed by such court on summary application by the commissioners to the same, and shall pay the costs of and attending such contempt as the said court shall direct (*a*).

Saving for persons claiming adversely to charities.

XV. Provided always, that nothing herein contained shall extend to give to the said board or their inspectors any power of requiring from any person holding or claiming to hold any property whatsoever adversely to any charity, or free or discharged from any charitable trust or charge, any information, or the production of any deed or document whatever in relation to the property so held or claimed adversely, or any charitable trust or charge alleged to affect the same (*b*).

Board to entertain applications for their opinion or advice.

XVI. The said board shall receive and consider all applications which may be made to them by any trustee or other person having any concern in the management or administration of any charity, for their opinion, advice or direction respecting such charity, or the management or

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(*a*) This attachment will issue from the Record and Writ Clerk's Office, upon a præcipe filled up in the usual form, with slight variation to suit the fact of its being a proceeding under this act, and will, it is presumed, issue of course upon production either of an affidavit or a certificate, as may be determined, of the party in contempt having been required to do the act in question, and of his having refused or wilfully neglected to do the same, or otherwise set this section of the act at defiance. The writ in this, as in other cases, is prepared by the person issuing it, according to the ordinary form.

(*b*) For other exemptions, wholly or partially, see sections 17, 18, 30, 35, 39, 41, 43, 46 and 62.

administration thereof, or the estates, funds, property or income thereof, or the application thereof, or any question or dispute relating to the same respectively, and, if they so think fit, may, upon any such application, give such opinion or advice as they think expedient, subject to any judicial order or direction which may be subsequently made or given by any competent court or judge (*c*); and such opinion or advice shall be in writing, signed by two or more of the said commissioners, and sealed with the seal of the said commission; and every trustee and other person who shall act upon or in accordance with the opinion or advice given by the said board shall in respect of so acting be deemed and taken, so far as respects his own responsibility, to have acted in accordance with his trust (*c*); and no such judicial order or direction subsequently made or given by any court or judge shall have any such retrospective effect as to interfere with or impair the indemnity by this act given to trustees and other persons who have acted upon or in accordance with such opinion or advice of the said board (*c*): provided always, that nothing herein contained shall extend to indemnify any trustee or other person for any act done in accordance with the opinion or advice of the said board, if such trustee or other person have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion or advice.

Persons acting on advice of board to be indemnified.

XVII. Before any suit, petition or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order or direction concerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken, by any person whomsoever, there shall be transmitted by such person to the said board notice in writing of such proposed suit, petition or proceeding, and such statement, information and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects

Notice of legal proceedings as to any charity by any person, except the attorney-general, to be given to the board.

(*c*) The indemnity would appear to be complete, although acts were done with a knowledge of proceedings pending before a competent court or judge, upon which a subsequent order or direction may be made at variance with such acts, provided such acts were in accordance with the opinion or advice of the board previously given.

thereof (*d*); and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition or other proceeding to be commenced, presented or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against liability to any costs or expenses, and to such other stipulations or provisions for the protection or benefit of the charity, as the said board may think proper; and such board, if it seem proper to them, may by such order or certificate as aforesaid require and direct that any proceeding so authorized by them in respect of any charity, shall be delayed during such period as shall seem proper to and shall be directed by such board; and every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit; and (save as herein otherwise provided) no suit, petition or other proceeding for obtaining any such relief, order or direction as last aforesaid shall be entertained or proceeded with by the

Courts not to entertain proceedings as to charities, except upon certificate of the board.

(*d*) The case of the proposed complainant or applicant must therefore be first submitted to the board. The sanction required by this section seems to apply to everything except a suit or matter actually pending, saving only the privileges of the attorney-general.

Where land belonging to a charity is taken by a railway company, and the purchase money paid into court, a petition for its re-investment requires the previous sanction of the charity commissioners, and must be entitled in the matter of Sir Samuel Romilly's Act. (*Ex parte the Haberdashers' Company*, 23 L. T. 36.)

So where a private act was passed before this act, empowering trustees to deal with charity property vested in them, with the sanction of the Court of Chancery; it was held, that the trustees were bound to apply for the certificate of the charity commissioners before taking proceedings in the Court of Chancery. (*Re Bingley School*, 2 Drewry, 282; 23 L. T., 139.)

So where trustees of a charity legacy paid it into court under the Trustees' Relief Act, a petition relating thereto was held not to be a matter within the exception in this act, and that therefore the certificate of the commissioners must be obtained. (*Re Markwell*, 23 L. J., 502.)

Court of Chancery, or by any court or judge, except upon and in conformity with an order or certificate of the said board: provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity (*e*).

Saving for the attorney-general acting ex officio.

XVIII. Provided always, that it shall be lawful for her Majesty's attorney-general acting ex officio to make such applications, and take and prosecute such proceedings with respect to any charity, in the Court of Chancery or otherwise as to him may seem fit, as if this act had not been passed; and that nothing in this act contained shall be construed as dispensing with the fiat or allowance of her Majesty's attorney-general, with respect to any proceeding not being an application under the jurisdiction created by this act where such fiat or allowance was necessary before the passing of this act (*f*).

Board may, upon the report of an inspector, authorize proceedings, where no notice has been given to them, and may in other cases cause local inquiries by their inspector.

XIX. Provided also, that where, upon any report of any inspector under this act or otherwise, it appears to the said board that any suit, petition or other proceeding concerning or relating to any charity, or the estate, funds, property or income thereof, would be proper or expedient, it shall be lawful for the said board by their order to authorize or direct such suit, petition or proceeding to be commenced, presented or taken, and to give such directions in relation thereto as the said board may think proper; and thereupon such suit, petition or proceeding may be commenced, presented or taken accordingly, without any such previous notice in writing as hereinbefore mentioned; and the said board, before giving any such opinion, advice or direction upon any such application as aforesaid, or making any such order or certificate after notice to them as aforesaid, may, where local inquiry appears to them to be requisite, cause such inquiry to be made by one of their inspectors; and the said board may, in any case where they see fit, before acting upon

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(*e*) For other exemptions, wholly or partially, see sections 15, 18, 30, 35, 39, 41, 43, 46 and 62.

(*f*) Where the attorney-general's fiat or allowance is still necessary, that is to say, where it was before necessary, and the case does not under this act become the subject of a newly created jurisdiction (but which in most cases it does), the former practice will prevail.

the report of any inspector, cause such report to be deposited for local inspection, and give notice of the same being so deposited, and consider any statements or objections which may be transmitted to them in relation thereto (*g*).

Power for board to certify certain cases to the attorney-general.

XX. In any case in which it shall appear to the said board that the institution of legal proceedings is requisite or desirable with respect to any charity, or the estates, funds, property or affairs thereof, and that under the circumstances thereof it is desirable that such proceedings should be instituted by the attorney-general, it shall be lawful for the said board, if they so think fit, to certify such case, in writing under the hand of the secretary of the said board, to her Majesty's attorney-general, together with such statements and particulars (if any) as in the opinion of the said board may be requisite or proper for the explanation of such case; and thereupon the said attorney-general, if upon consideration of the circumstances he think fit, shall institute and prosecute such legal proceedings as he shall consider requisite or proper under the circumstances of such case, by information or petition in the Court of Chancery, or by application to a judge thereof at chambers, or to a district court of bankruptcy, or county court under the jurisdiction given by this act (*h*).

Board may sanction building leases, working mines, doing repairs and improvements;

XXI. If in any case it appear to the trustees or persons for the time being acting in the administration or management of any charity, or the estates or property thereof, that any part of the charity lands or estates may be beneficially let on building, repairing, improving or other leases, or on leases for working any mine, or that the digging for or raising of stone, clay, gravel or other minerals, or the cutting of timber, would be for the benefit of the charity, or that it would be for the benefit of such charity that any new road or street should be formed or laid out, or any drains or sewers made through any part of the charity estates, or that any new building should be erected, or that any existing building should

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(*g*) An order will, it is presumed, be made in this case as if notice had been given to the board under the 17th section.

(*h*) An extensive discretion is here given to the board in determining in what cases the attorney-general shall or shall not be introduced.

be repaired, altered, rebuilt or wholly removed, or that any other improvements or alterations in the state or condition of the lands or estates of such charity should be made, it shall be lawful for such trustees or persons to lay before the said board a statement and proposal in relation to any of the matters aforesaid; and it shall be lawful for the said board, if they think that the leases or acts to which the statement and proposal relate (with or without modifications or alterations) would be beneficial to the charity, to make such order under their seal for and in relation to the granting of such leases, or the doing of any other such acts as aforesaid, and any circumstances connected therewith, as they may think fit, although such leases or acts respectively shall not be authorized or permitted by the trust; and the said board, by any such order, may authorize the application of any monies or funds belonging to the charity for any of the purposes or acts aforesaid, and, if necessary, may authorize the trustees to raise any sum of money by mortgage of all or any part of the charity estates; provided that compulsory provisions be reserved in every such mortgage for the payment of the principal money borrowed by annual instalments, and for the redemption and reconveyance of the mortgaged estates, within the period of not more than thirty years.

and may authorize the application of the charity funds or the raising of money on mortgage for those purposes.

XXII. It shall be lawful for the board, upon proof to their satisfaction that any schoolmaster or schoolmistress or other officer of any charity has been negligent in performing his or her duties, or that he or she is unfit or incompetent to discharge them properly, either from immoral conduct, age or any other cause whatsoever, to empower the trustees of such charity to remove such school master or mistress or other officer, and to charge the salary of his or her successors, or any other portion of the revenues of the charity, with such retiring pension or allowance, if any, in favour of the person so removed, and generally to impose such conditions as to the said board shall appear proper: provided always, that where there shall be any special visitor of the charity, the consent of such visitor, in writing under his hand, shall be necessary in order to such removal.

Commissioners to authorize trustees to remove officers.

XXIII. If in any case it appear to the trustees or persons acting in the administration of any charity that any claim or demand or cause of suit against any person

Board may sanction compromise of claims on behalf of charity.

in relation to such charity may, with advantage to the charity, or should, under the special circumstances of the case, be compromised or adjusted without taking or without continuing any proceedings at law or in equity, such trustees or persons may, or the person against whom such claim, demand or cause of suit exists or is alleged to exist, may, with the consent of the trustees or persons acting in the administration of such charity, submit to the said board a statement and proposal for such compromise or adjustment; and if it appear to the said board after such inquiry in relation thereto by one of their inspectors, as they may deem requisite, or otherwise, that such proposal, either with or without any modification, is fit and proper, and for the benefit of the charity, it shall be lawful for the said board to make such order for and in relation to such compromise or adjustment as they may think fit; and upon the due performance of the terms and conditions of such compromise or adjustment as aforesaid, such agreement shall be a final bar to all actions, suits, claims and demands by or on behalf of the charity concerned therein, in respect to the cause of action, suit or matter in respect to which such compromise or adjustment shall have been made (*i*).

Board, under special circumstances, may authorize sale or exchange of charity lands.

XXIV. Upon application to the said board by the trustees or persons acting in the administration of any charity, representing to the said board that, under the special circumstances of any land belonging to the charity, a sale or exchange of such land can be effected on such terms as to increase the income of the charity, or would otherwise be advantageous to the charity, such board may, if they think fit, inquire into such circumstances, and if after inquiry they are satisfied that the proposed sale or exchange will be advantageous to the charity, may authorize the sale or exchange, and give such directions in relation thereto, and for securing the due investment of the money arising from any such sale,

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(*i*) The trustees or persons acting in the administration of the charity may submit to the board a proposal for compromise or adjustment, without the sanction of the defendant or person proceeded against, who, however, on the other hand, cannot himself submit such a proposal without the consent of the trustees or persons so acting.

or by way of equality of exchange for the benefit of the charity, as they may think fit.

Board may authorize the redemption of rentcharges.

XXV. The said board shall have authority, upon such application as aforesaid, to authorize the sale to the owners of the land charged therewith of any rentcharge, annuity or other periodical payment charged upon land and payable to or for the benefit of any charity, or applicable to charitable purposes, upon such terms and conditions as they may deem beneficial to the charity, and to give such directions for securing the due investment of the money arising from such sale for the benefit of the charity, or for securing the due application thereof to such charitable purposes, as they may think fit; and in like manner the trustees of any charity, with the consent of the board, may purchase any rentcharge or other yearly payment to which the charity estate is or shall be liable.

Leases, sales, &c. authorized by the board to be valid.

XXVI. The leases, sales, exchanges and other transactions authorized by such board under the powers of this act shall have the like effect and validity as if they had been authorized or directed by the express terms of the trust affecting the charity.

Trustees of charities enabled to purchase sites for building from owners under disability, &c. according to the provisions of Lands Clauses Consolidation Act, 1845.

XXVII. Where any land shall be required for the erection or construction of any house or building with or without garden, playground or other appurtenances, for the purposes of any charity, and the trustees of the charity shall be legally authorized to purchase and hold such land, but by reason of the disability of any person having an estate or interest in such land, or of any defect in title thereto, a valid and perfect assurance of the same land cannot be made to the trustees of the charity in the ordinary manner, it shall be lawful for the trustees of the charity, with the sanction of the said board (such sanction to be certified under the hand of their secretary), to take and purchase such land according to the provisions of "The Lands Clauses Consolidation Act, 1845;" and for that purpose all the clauses and provisions of the last-mentioned act with respect to the purchase of lands by agreement, and with respect to the purchase money or compensation coming to parties having limited interests, or prevented from treating, or not making a title, and also with respect to conveyances of lands, so far as the same clauses and provisions respectively are applicable to the cases contemplated by this provision, shall be incor-

porated in this act; and in all cases contemplated by this provision, the expression "the special act" used in the said clauses and provisions of the said "Lands Clauses Consolidation Act" shall be construed to mean this act; and the expression "the promoters of the undertaking," used in the same clauses and provisions, shall be construed to mean the trustees of the charity in question.

In cases of charities the incomes of which exceed 30*l.*, Master of the Rolls and Vice-Chancellors, upon applications to them at chambers, to have the same jurisdiction as the Court of Chancery or Lord Chancellor now has upon information, &c.

XXVIII. Where the appointment or removal of any trustee, or any other relief, order or direction relating to any charity of which the gross annual income for the time being exceeds thirty pounds, shall be considered desirable, and such appointment, removal, or other relief, order or direction might now be made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorized in this behalf by the order or certificate of the said board, or for the attorney-general, to make application (without any information, bill or petition) to the Master of the Rolls or one of the Vice-Chancellors sitting at chambers, for such order, direction or relief as the nature of the case may require; and the Master of the Rolls or the Vice-Chancellor to whom any such application shall be made shall and may proceed upon and dispose of such application in chambers, save where he may think fit otherwise to direct, and shall and may have and exercise thereupon all such jurisdiction, power and authority, and make such orders and give such directions in relation to the matter of such application, as might now be exercised, made or given by the Court of Chancery or by the Lord Chancellor intrusted as aforesaid, in a suit regularly instituted, or upon petition, as the case may require; and the Master of the Rolls and Vice-Chancellors respectively shall, in relation to such applications as aforesaid, and the proceedings thereon (subject to any rules which may be made by the Lord Chancellor, with the advice and consent of them or any two of them) (*k*), have all such

(*k*) By a Chancery Order of the 9th December, 1853, made in pursuance of this act, it is determined as follows:—That any application to the Master of the Rolls, or to a Vice-Chancellor, under "The Charitable Trusts Act, 1853," section twenty-eight, shall be made by summons, and such summons

powers of directing matters to be heard in open court, and of ordering what matters shall be heard and investigated by themselves and their chief clerks respectively, and such other powers and authorities as by the act of the last session of parliament, chapter eighty, are vested in or authorized to be exercised by them at chambers, and the provisions of the said act applicable to orders made by the Master of the Rolls or any of the Vice-Chancellors at chambers shall extend to all orders so made under this

15 & 16 Vict. c. 80.

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may be in the form set out in schedule A. annexed to the General Order of the sixteenth day of October, one thousand eight hundred and fifty-two, or as near thereto as the nature of the case may permit.

The fees payable on proceedings before the Master of the Rolls, or any of the Vice-Chancellors under the said act, shall be the same as are payable according to the order of the twenty-third day of October, one thousand eight hundred and fifty-two, in respect of other proceedings commencing by summons, and shall be collected by means of stamps, as directed by the order of the twenty-fifth day of October, one thousand eight hundred and fifty-two.

In all cases in which the Master of the Rolls, or any Vice-Chancellor, shall direct that any matter commenced by summons under the said act shall be heard in open court, the same fees shall be payable, and the same costs shall be allowed, as would have been payable in respect of any other matter so heard.

No order made under the said act by the Master of the Rolls, or by any of the Vice-Chancellors, shall be subject to appeal where the gross annual income of the charity has not been declared by the charity commissioners for England and Wales to exceed one hundred pounds, unless the Master of the Rolls, or the Vice-Chancellor by whom such order may have been made, shall certify that such appeal ought to be permitted, either absolutely or on such terms as the said Master of the Rolls or Vice-Chancellor may think fit to impose.

(Signed) CRANWORTH, C.
JOHN ROMILLY, M. R.
RICHD. T. KINDERSLEY, V. C.
JOHN STUART, V. C.
W. P. WOOD, V. C.

act (*k*): provided always, that, save as may be otherwise provided by any rules to be made by the Lord Chancellor, with such advice and consent as aforesaid, the determinations of the Master of the Rolls and Vice-Chancellors respectively upon and in relation to such applications as aforesaid shall not be subject to appeal in any case where the gross annual income of the charity does not exceed one hundred pounds: provided also, that it shall be lawful for the Master of the Rolls or any Vice-Chancellor, where under the circumstances of any application as aforesaid he may so see fit, to direct that for obtaining the relief, order or direction sought for by such application an information, bill or petition, as the case may require, shall be filed or presented and prosecuted as now by law required, and to abstain from further proceeding on such application (*k*).

Provision as to charities within the jurisdiction of the Court of Chancery of the county palatine of Lancaster.

XXIX. The jurisdiction created and given by this act to the Master of the Rolls and the Vice-Chancellors sitting in chambers, upon any application to them respectively as aforesaid, shall extend concurrently to and may be exercised by the Chancellor of the duchy and county palatine of Lancaster and the Vice-Chancellor of the same county palatine respectively for the time being, as to every charity within the jurisdiction of the Court of Chancery of the said county palatine whose gross annual income for the time being exceeds thirty pounds, upon application being made to such Chancellor or Vice-Chancellor respectively; and it shall be lawful for the Chancellor of the said duchy and county palatine, with the concurrence of the Vice-Chancellor of the same county palatine, from time to time to make and issue any rules and orders for regulating the modes of proceeding and the fees to be taken in respect of proceedings under this act.

Provisions as to charities exceeding 30*l.* per annum to extend to charities in London not exceeding 30*l.*

XXX. Provided always, that the provisions of this act applicable to any charity the gross annual income whereof exceeds thirty pounds shall extend to any charity established or administered or applicable to or for objects or purposes within the city of London the gross annual income whereof does not exceed thirty pounds, in like manner as if such income exceeded that amount (*l*).

(*k*) See note (*k*), ante, p. 654.

(*l*) The effect of this section is to exclude the jurisdiction of the district courts of bankruptcy and county courts,

Lord Chancellor, with the advice of Master of the Rolls and Vice-Chancellors, or two of them, to make general orders.

XXXI. It shall be lawful for the Lord-Chancellor, with the advice and consent of the Master of the Rolls and Vice-Chancellors, or any two of them, to make and issue general rules and orders for regulating the mode and form of applications at the chambers of the Master of the Rolls and Vice-Chancellors respectively under this act, and the proceedings thereon, and for determining in what cases and under what conditions and restrictions the determinations of the Master of the Rolls and Vice-Chancellors respectively upon or in relation to such applications shall be subject to appeal, and the fees and allowances to solicitors of the Court of Chancery, and the fees to be payable in money or by stamps to the officers of the said court in respect of such applications and proceedings thereon; and such rules and orders may from time to time be varied by the like authority; and all such rules and orders shall be deemed general orders of the said court (*m*).

District courts of bankruptcy and county courts to have jurisdiction in cases of charities the incomes of which do not exceed 30*l*.

XXXII. Where any charity of which the gross annual income for the time being does not exceed thirty pounds shall be established or administered or be applicable wholly or partially to or for objects or purposes within the district or any two or more of the districts of any district court of bankruptcy or of any county court or courts holden under the act of the session holden in the ninth and tenth years of the reign of her Majesty, chapter ninety-five, and the appointment or removal of any trustee, or any other relief, order or direction whatsoever concerning such charity shall be considered desirable, and such appointment or removal, or other relief, order or direction might now be made or given by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorized in this behalf by the order or certificate of the said board, or for the attorney-general, to make application to such

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given by the 32nd section, in the cases of city charities, and to substitute the jurisdiction of the equity judges, conferred by the 28th section.

For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 35, 39, 41, 43, 46 and 62.

(*m*) See note (*k*), ante, p. 654.

district or county court, or, as the case may be, to any one of such district or county courts, for such order, direction or relief as the nature of the case may require; and such district or county court shall entertain such application, and shall hear the matter in open court, and shall give such relief and make such orders and directions in relation to the matter of such application as might now be made or given by the Court of Chancery or by the Lord Chancellor, intrusted as aforesaid, in a suit regularly instituted, or upon petition, as the case may require; and the clerk of such county court shall transmit a copy of such order or direction to the office in London of the registrar of county courts judgments, to be there enrolled: provided always, that no judge of any district or county court shall be authorized to vary any decree, order or direction of the Court of Chancery, or of any judge thereof, or to make or give any order or direction inconsistent or conflicting with any such decree, order or direction: provided also, that where two or more district or county courts shall have concurrent jurisdiction with respect to any charity under this act, no application in respect of such charity shall be made to or entertained by more than one of such district or county courts at the same time (*n*).

Duputy sitting for county court judge not to exercise jurisdiction.

XXXIII. The jurisdiction hereby created and conferred on the county courts with respect to any charity shall not be exercised by any deputy or other person who may for the time being be appointed to sit and shall be sitting for any such judge.

Where two or more courts have concurrent jurisdiction, board to direct to which court applications shall be made.

XXXIV. Where two or more district courts of bankruptcy or county courts shall concurrently have jurisdiction under this act with respect to any charity, it shall be lawful for the said board to order to which of such courts any application with respect to such charity shall be made; and every such order shall be conclusive as to the jurisdiction with respect to the application referred to in such order.

Board may direct cases within the jurisdiction

XXXV. It shall be lawful for the said board to direct that any application as to any charity within the jurisdiction of any district court of bankruptcy or county court

(*n*) The city charities are excluded from the operation of this section by the 30th section, which renders them subject to the jurisdiction created by the 28th section.

shall be made before a judge of the Court of Chancery, or as to any charity within the jurisdiction of the Court of Chancery of the county palatine of Lancaster, either before the Chancellor or the Vice-Chancellor of the same county palatine, or before a judge of the High Court of Chancery, according to the provisions herein contained applicable to a charity the gross annual income whereof exceeds thirty pounds, and in such case such application shall be made and may be heard and determined accordingly, in the like manner as if the gross annual income of such charity exceeded thirty pounds; and upon the production of the order or certificate containing such direction, or of a copy thereof, the application with respect to which such order or certificate shall have been made shall not be entertained or proceeded with by such district or county court (*o*).

Of a district or county court to be taken before a judge of the Court of Chancery in the first instance.

XXXVI. Whenever any order or decision is made by any district court of bankruptcy or county court for the appointment or removal of any trustee of any charity, or approving of any scheme for regulating or directing the administration of any charity, or the estate, funds, property or income thereof, a copy of every such order or decision shall immediately upon the making thereof be delivered or transmitted by the deputy registrar of such district court or by the clerk of the county court, as the case may be, together with all requisite particulars, to the said board, for the purpose of being considered by them; and no such order or decision shall be valid or effectual until the same shall have been approved by the said board, such approval to be testified by a certificate in writing, signed by the secretary of the said board; and no such approval shall issue from the said board until one calendar month shall have elapsed after the receipt by the board of such copy and particulars.

No order of district or county court for the appointment or removal of trustees or approval of a scheme to be valid unless confirmed by board.

XXXVII. In case any such order or decision as last aforesaid of any district court of bankruptcy or county court shall not be approved by the said board, it shall be lawful for such board to remit the same for reconsideration

Board, if dissatisfied with the order of district or county court

(*o*) This is in effect to bring cases under 30*l.* a year within the operation of the 28th section. Consequently, it is a power to the board only to be exercised in special cases. For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 39, 41, 43, 46 and 62.

may remit the case for reconsideration, or may transfer the matter to a judge of the Court of Chancery.

and decision by such district or county court, with such remarks and recommendations thereon (if any) as shall seem fit and expedient to such board, or, in the discretion of the board, to order and direct that the subject-matter to which such order or decision relates, together with such order or decision, shall be submitted to the consideration and decision of a judge of the Court of Chancery, and in such last-mentioned case no further proceedings shall be had or taken in the district or county court with respect to the matter in question; and in case the order or decision of the district or county court, on the reconsideration of any order or decision so remitted for reconsideration, be disapproved as aforesaid by the said board, such board shall refer such orders and decisions, and the subject-matter thereof, to a judge of the Court of Chancery, or, as to any charity within the jurisdiction of the Court of Chancery of the county palatine of Lancaster, either to the Chancellor or the Vice-Chancellor of the same county palatine or to a judge of the High Court of Chancery; and where any order or decision is referred to a judge of the Court of Chancery, or of the Court of Chancery of the said county palatine of Lancaster, under this provision, such judge shall have and exercise all such jurisdiction, power and authority in relation thereto as in the case of a charity the gross annual income whereof exceeds thirty pounds, and may make such order in relation to the matter of such order or decision as to him may seem proper (*p*).

How orders of district or county court under this act to be enforced.

XXXVIII. Subject to any orders to be made by the Lord Chancellor as hereinafter mentioned (*q*), and to the other provisions of this act, all proceedings to be taken in any district court of bankruptcy or county court, and all orders and directions to be made or given by any such district court or county court by virtue of the jurisdiction hereby created and conferred on such court, shall respectively be subject to the same rules and regulations, and have the same effect, and be registered, enforced and

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(*p*) This section, also at the discretion of the board, subjects cases under 30*l.* a year to the operation of the 28th section, but only after it has been entertained and adjudicated upon by the district or county court; or, it provides for rehearings before the court originally deciding such cases.

(*q*) See note (*z*), post, page 665.

executed in the same manner as the other proceedings, orders, judgments and directions of the same court under its ordinary jurisdiction, and it shall be lawful for any such district court, or for any county court, with the consent of the board, to rescind or vary any order which shall have been previously made by such court, without prejudice to any act or matter in the meantime done under such order; and for executing and putting in force any order to be made by any county court under this act, every judge of any such court shall and may have and exercise all such powers as by the act of the session holden in the ninth and tenth years of her Majesty, chapter ninety-five, are given for enforcing the payment of any debt, damages or costs under the said act.

Appeal.

XXXIX. Where any person authorized to make any application under this act, (other than her Majesty's attorney-general acting ex officio,) or any other person who may have been made a party to any proceeding upon any application under this act, is aggrieved by or dissatisfied with any order made by any district court of bankruptcy or county court upon any such application, or any proceeding thereon, he may, within one calendar month after the making of such order, give notice in writing to the said court, and also to the said board, that he is desirous to appeal against the same; and if the said board think it reasonable and proper that such appeal should be entertained, and give a certificate to that effect, such district or county court shall suspend any proceedings upon the order appealed against during such time as the circumstances may require; and the said board, if they so think fit, may require the person giving any such notice of appeal to become bound with two sufficient sureties, to be approved by the deputy registrar of such district court, or by the clerk of the county court, as the case may be, to the treasurers of the said courts respectively, or such other person as the said board may see fit, in such sum as to the said board shall seem reasonable, to pay such costs of the proceedings on the appeal as shall be ordered to be paid by such appellant, and also (if the said board so think fit) to indemnify the charity against the costs and expenses of or attending such appeal; and every bond executed under this provision shall be exempt from stamp duty: provided always, that it shall be lawful for her Majesty's attorney-general (acting ex officio),

at any time within three calendar months after the making of any order by a district court or county court under this act, to lodge and commence and prosecute an appeal against such order, without giving any such notice or becoming bound as aforesaid, and every such last-mentioned appeal shall thereupon be allowed by the order of such district or county court, and shall have such other effect as any other appeal under this act (*r*) (*s*).

Proceedings on appeal.

XL. Where any order allowing an appeal has been made as aforesaid, the person thereby allowed to appeal shall within three calendar months present a petition to the Court of Chancery, setting forth the order appealed against, and the order allowing such appeal, and praying such relief as the case may require; and upon the hearing of such petition the court may confirm, vary or reverse the order appealed against, or may remit such order to the district court of bankruptcy or county court by which the same was made, with or without any declaration or directions of the Court of Chancery in relation thereto, or may proceed in relation to the charity to which such order relates as in the case of an application under this act to a judge of the Court of Chancery at chambers, and any judge of such court sitting at chambers or in open court may make or give any such orders or directions in relation to the matter of such order as he may see fit, or the court may make such other order in relation to the matter of any such appeal as to the court may seem just, and as might be made in the case of a suit regularly instituted, or a petition, as the case may require (*t*); and in case the party allowed to appeal do not within such three

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(*r*) For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 35, 41, 43, 46 and 62.

(*s*) The appeal, therefore, from the district and county courts seems to be to one of the chamber judges of the Court of Chancery, and not the Lord Chancellor or the Lords Justices. Neither is there any appeal from the decisions of the chamber judges on matters coming within the jurisdiction created by the 28th section, where the gross annual income of the charity has not been declared by the board to exceed 100*l.*, unless the judge shall certify that such appeal ought to be permitted, either absolutely or on such terms as such judge may think fit to impose. (28th section, and Chancery Order of 9th December, 1853, page 654, ante.)

(*t*) See note (*s*), supra.

calendar months present such petition of appeal, the order against which such appeal was allowed shall be final; and in case any costs adjudged on any such appeal to be paid by the party allowed to appeal be not paid, such bond as aforesaid may be put in suit, and the money to be recovered on every such bond shall be applied to indemnify the charity estate or the person damnified, or otherwise in such manner as the justice of the case may require, and the court or judge by whom such appeal may have been heard shall think fit.

Bond to prosecute appeal may be put in suit.

XLI. Provided always, that no judge of the Court of Chancery, nor any district court of bankruptcy or county court, shall upon any proceedings under this act have jurisdiction to try or determine the title at law or in equity to any real or personal property, or any term or interest therein, as between any charity, or the trustee thereof, and any person holding or claiming such real or personal property, term or interest adversely to such charity, or to try or determine any question as to the existence or extent of any charge or trust (*u*) (*x*).

No Chancery judge, or district or county court, in proceedings under this act to try titles, &c.

XLII. Before any application shall be made to any judge of the Court of Chancery, or to any district court of bankruptcy or county court, under any of the provisions herein contained for the establishment or alteration of a scheme or the appointment or removal or any trustees or trustee, notice in writing of such intended application shall be given in such form and manner as the said board shall have directed; and if the order be that such notice be affixed to or near the door of any parish or district church, the incumbent and churchwardens of such parish or district are hereby respectively required to allow such notice to be affixed and to remain so affixed during such period, not less than fifteen days, as the said board shall have ordered; and in any case in which the order shall be that such notice shall be affixed to any place, evidence that the same has been so affixed shall be deemed and taken as primâ facie evidence that it has remained affixed during the period prescribed by the board.

Notice to be published of application for schemes or appointment or removal of trustees under this act.

(*u*) Questions of this nature will be dealt with either at law or in equity as before this act.

(*x*) For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 35, 39, 46 and 62.

By whom applications may be made.

XLIII. Every application to any judge or court, under the jurisdiction created or conferred by any of the provisions of this act, may be made by her Majesty's attorney-general, or, subject to the provisions aforesaid, by all or any one or more of the trustees or persons administering or claiming to administer, or interested in, the charity which shall be the subject of such application, or any two or more inhabitants of any parish or place within which the charity is administered or applicable; and it shall be lawful for her Majesty's attorney-general for the time being, acting ex officio, to make application by petition to the Court of Chancery with respect to any charity under the provisions of the act passed in the fifty-second year of King George the Third, chapter one hundred and one, or under the provisions of any act or acts passed or to be passed authorizing the application to the same court by petition according to the provisions of the said act (*y*).

Attorney-general may petition under 52 Geo. 3, c. 101.

Statement in certificate of board of the amount of income of any charity to be sufficient evidence for determining the jurisdiction or proceedings under this act.

XLIV. For the purposes of determining the jurisdiction under this act with respect to any charity, or the right to appeal from the determination of a judge of the Court of Chancery, it shall be lawful for the said board to declare, according to such judgment as they may be able to form upon the returns or statements before them in relation to any charity, whether the gross annual income for the time being of such charity does or does not exceed 30*l.* or 100*l.* (as the case may require), and a statement in any certificate or order of the said board that according to such judgment as aforesaid the gross yearly income of any charity does or does not exceed 30*l.* or 100*l.* shall be sufficient evidence of the amount of the gross annual income of such charity, for the purpose of determining such jurisdiction or right to appeal as aforesaid; and any certificate or order made by the said board under this act, authorizing any proceeding or application concerning any charity to be taken or made to any district court of bankruptcy or county court or to the Court of Chancery or any judge thereof, shall state that the gross annual income for the time being of such charity does not exceed 30*l.*, or does exceed 30*l.* (as the case may be): provided always, that where any charity, or the trustees thereof, in addition to the principal endow-

Proviso as to particular endowments.

(*y*) For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 35, 39, 46 and 62.

ment for its general objects and purposes, shall be possessed of or entitled to any other endowment for any particular or special object or purpose arising out of or in its nature or application connected with the general objects or purposes of such charity, it shall be lawful for the said board, having regard to the circumstances of each such case, and to the object and extent of the proposed application and litigation, to determine whether such endowment for such particular or special object or purpose should, for the purposes of jurisdiction and proceedings under this act, be considered and treated as forming part of the general endowment of the charity, or as a separate or independent charity, and such board shall frame their certificate or order accordingly.

Lord Chancellor to make orders for regulating proceedings before district and county courts.

XLV. The Lord Chancellor shall make such orders for regulating proceedings by and before the judges of district courts of bankruptcy and county courts under this act, and for fixing and determining the fees to be taken in respect of such proceedings, as he may see fit(*z*); and, subject to such orders, such judges may

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(*z*) In pursuance of this section the Lord Chancellor has made and issued the following Orders, dated the 8th December, 1853, but which relate only to county courts:—

ORDERS for regulating Proceedings by and before the Judges of County Courts under "The Charitable Trusts Act, 1853," and for fixing and determining the Fees to be taken in respect of such Proceedings, made by the Right Honourable Robert Monsey, Baron Cranworth, Lord High Chancellor of Great Britain.

Record.

I. The clerk of every county court shall keep a book, in the form in the schedule hereunto annexed, to be called "The Charitable Trusts Book," in which a record shall be kept of all proceedings taken in that court in matters of charitable trusts.

Proceedings by private persons.

II. When any person has obtained the required order or certificate from the Charity Commissioners, and he is desirous of taking proceedings in the county court, he shall produce such order or certificate to the clerk, who shall retain and file the same in numerical order in his office, and the party producing such order or certificate shall be deemed the plaintiff in such proceedings; and the person served with a *summons* under Order IV. shall be deemed the defendant.

Proceedings by attorney-general.

III. When the attorney-general shall propose to take proceedings in the county court, he shall cause to be delivered

Judges to regulate proceedings.

regulate the proceedings before them respectively so as to render them as summary and inexpensive as conveniently may be.

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or transmitted to the clerk a written statement showing the nature and object of the proposed proceedings, and the clerk shall retain and file such statement in numerical order in his office, and the attorney-general shall in such proceedings be deemed the plaintiff; and the person served with a summons under Order IV. shall be deemed the defendant.

Summons.

IV. Upon the production of any order, certificate or statement hereinbefore mentioned, the clerk shall at the instance of the plaintiff prepare a *summons* thereon in the form set forth in the schedule hereunto annexed, in which shall be stated the substance of the order, certificate or statement, and he shall make as many copies thereof as there are parties required by the plaintiff to be summoned, and two additional copies, the one to be filed in the clerk's office, and the other to be transmitted to the Charity Commissioners.

Notice to attend proceedings.

V. The clerk, if required by the plaintiff, shall prepare a *notice to attend proceedings* in the form set forth in the said schedule to be served on any persons indicated by the plaintiff, besides those summoned under the last preceding order, and the said clerk shall make as many copies thereof as there are persons to whom such notice is to be given, and two additional copies, one to be filed in his office, and the other to be transmitted to the Charity Commissioners.

Service of summons, and notice to attend proceedings.

VI. The clerk shall forthwith transmit by prepaid post letter a copy of the *summons* to each of the parties required to appear; and a copy of the *notice to attend proceedings* to each of the persons indicated by the plaintiff, and such transmission shall be sufficient service, unless the judge shall otherwise direct.

Notice of hearing.

VII. Where the plaintiff does not require any *summons* or *notice to attend proceedings* to be issued, the clerk shall prepare a *notice of hearing*, in the form set forth in the said schedule, and two additional copies thereof, one to be filed in his office, and the other to be transmitted to the Charity Commissioners, and shall either deliver such notice to the plaintiff, or cause it to be served on him by prepaid post letter, unless the judge shall otherwise direct.

Summons and notices to be issued in certain cases.

VIII. In all cases it shall be competent for the clerk, if required by the plaintiff, to *summon* some persons, and to serve others with either or both of the said *notices*, or to serve a *notice of hearing* on the plaintiff, and a *notice to attend proceedings* on any other person.

Judge's power.

IX. In all cases, it shall be competent for the judge to direct what persons, or additional persons, shall be served

XLVI. Nothing herein contained shall diminish or detract from any right or privilege which by any rule or

Reservation of rights and privileges of Church of

with a *summons* or *notice to attend proceedings* or *notice of hearing*.

X. Upon the requisition of the Charity Commissioners, a copy of the judge's note of the evidence taken at the hearing, or such part thereof as may be required by the Commissioners, shall be transmitted by the judge to them at their office by post or otherwise.

Judge's note in ordinary cases.

XI. Upon the requisition of the attorney-general in proceedings instituted by him, a copy of the judge's note of the evidence taken at the hearing, or such part thereof as may be required by the attorney-general, shall be transmitted to him by post or otherwise.

Judge's note where attorney-general proceeds.

XII. A copy of the summons, notice to attend proceedings, notice to appear, together with a copy of the order made by the court, shall in all cases be transmitted by the clerk, forthwith after the hearing, by post or otherwise, as the judge shall direct, to the office of the Commissioners.

Copy of proceedings to be sent to commissioners.

XIII. Where the annual income of the charity exceeds 10*l.*, the court fees shall be payable as in cases within the ordinary jurisdiction of the court, without prejudice to the privilege of the attorney-general as to costs, and the charitable funds may be made liable to the payment thereof, at the discretion of the judge.

Fees where income of charity exceeds 10*l.*

XIV. Where the annual income of the charity does not exceed the sum of 10*l.*, no fees of court shall be payable out of the funds of the charity; nor shall any fees be paid by any party to the proceeding, unless the judge shall, in his discretion, order any of the parties to the proceeding before him to pay such fees of court as he shall think fit, without prejudice to the privilege of the attorney-general as to costs.

Fees where income does not exceed 10*l.*

XV. Where court fees are payable, they shall be calculated according to the scale of fees applicable to proceedings for the recovery of tenements under the 9th and 10th Vict. cap. 95, sect. 122, the annual income of the charity, like the annual rent of the tenement, being treated as the basis of calculation.

Fees how calculated.

XVI. The order or certificate of the Commissioners, or statement of the attorney-general, as to the amount of the annual income, shall be conclusive on the court.

Income how determined.

XVII. The enactments, Secretary of State's orders, practice and forms in force and used in the county courts shall, subject to the foregoing orders, be adopted with reference to proceedings in matters of charitable trusts, so far as the same are applicable, *mutatis mutandis*.

Practice to continue subject to these orders.

England with respect to charities.

practice of the Court of Chancery, or by the construction of law, now subsists for the preference or the exclusive

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Power to revoke orders reserved.

XVIII. The above orders shall be in force, until further orders shall be made under "The Charitable Trusts Act, 1853," for regulating proceedings in the county courts relating to charitable trusts.

Dated this 8th day of December, 1853.

CRANWORTH C.

SCHEDULE OF FORMS.

Summons.

In the county court of ——, holden at ——.

(Seal.)

In the matter of [*title of charity*].

No. of charity.

[*Name, description and address of party to be summoned.*] You are hereby summoned to appear at a county court to be holden at ——, on the —— day of ——, 18—, at the hour of —— in the forenoon, upon the hearing of an application which has been made to the court in the matter of the above charity, by which it is suggested [*here state substance of order, certificate or statement*]. And you are informed, that if you do not attend pursuant to the requisition of this summons, the court may proceed in the matter in your absence, and make such order as may appear just therein. And you are further informed, that if you do not obey such order, you will be liable to be imprisoned by order of the court.

A. B.,
Clerk of the Court.

Dated this —— day of ——, 18—.

Notice to attend Proceedings.

In the county court of ——, holden at ——.

(Seal.)

In the matter of [*title of charity*].

No. of charity.

[*Name, description and address of party to whom notice is to be given.*] Take notice, that the hearing of an application in the matter of the above charity, by which it is suggested [*here state substance of order, certificate or statement*], will take place on the —— day of ——, 18—, at the above county court.

or special benefit of the Church of England, or the members of the same church, in settling any scheme for the

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The object of this notice is that if you are desirous of attending the said hearing, you are at liberty to do so, and you may be heard in support of any objection you have to such proceedings in respect of the above charity.

But if you do not attend at the hearing, you will not be subject to any costs or penalty in respect of such non-attendance.

A. B.,
Clerk of the Court.

Dated this —— day of ——, 18—.

Notice of Hearing.

In the county court of ——, holden at ——.
(Seal.)
In the matter of [*title of charity*].
No. of charity.

[*Name, description and address of party to whom notice is to be given.*] Take notice, that the hearing of the application in the matter of the above charity is appointed to take place at this court on the —— day of ——, 18—.*

A. B.,
Clerk of the Court.

Dated this —— day of ——, 18—.

* *This should be at the earliest convenient sitting of the court.*

Form of Record.

Ashley, Lady, Charity of, In the matter of.
No. 1.

On the —— day of ——, 18—, an order [certificate, *or* statement, *as the case may be*] was produced by [*state the party producing or transmitting it*], and the same has been numbered 1 [*or, as the case may be; according to the priority of production to the clerk.*]

On the —— day of ——, 18—, a summons [*or other process, as the case may be*] was issued and directed to be served by post [*or otherwise, as the case may be*] on [*state the parties*], requiring him [her, *or* them, *as the case may be*] to appear at this court on the —— day of ——, 18—.

At a court holden on the —— day of ——, 18—, appeared

regulation of any charity, or in the appointment or removal of trustees, or generally in the application or management of any charity (*a*).

Secretary to be treasurer of charities; such treasurer to be a corporation.

XLVII. The secretary for the time being of the said board shall by virtue of his appointment be the treasurer of public charities; and such treasurer shall, for the purposes of taking, holding, conveying, assigning, transferring and transmitting real property, including leaseholds for lives or years, be a corporation sole by the name of "The Treasurer of Public Charities," and by that name shall have perpetual succession, and plead and be impleaded before all courts, justices and others.

Land holden upon trust for a charity, subject to jurisdiction of Court of Chancery and of judge may be vested in treasurer.

XLVIII. Where any land, or any term or estate therein, holden upon trust for any charity, shall be vested in any persons other than the persons acting in the administration and application of the rents; or where there shall be no trustees thereof, or the trustees, or any of them, shall be unwilling to act, or it shall be uncertain in whom such land, term or estate shall be vested, or all or any of

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[*state parties appearing, or reasons for not appearing, and whether they appeared by counsel or otherwise. If any adjournment takes place, state the cause thereof, and adjournment, and until when adjourned; then on the adjournment day, proceed in a similar manner as on the first day of hearing; and the same on every successive adjournment day. When the matter is finally disposed of, then proceed*—

The matter having been heard, the court made the following order [*here state the order. If any other proceedings, whether before or after the final order, are taken in the matter, they must be recorded in a similar manner in their proper places. It will not be necessary to set forth on the record any of the evidence, as that will appear on the judge's notes; but any document produced, or any copy thereof, which the judge requires to be filed, should be filed along with the other papers relating to the matter.*]

[*When the record of proceedings in any charity occupies more than one page, the record may be continued on the next blank page, and a reference should be made from such previous page to such next page, and from such next page to such previous page. The book in which the record is kept should be paged throughout, and have an alphabetical index at the end. The names of the charities should be arranged in the index alphabetically, and the numbers of the pages in which any proceedings are recorded should be given at the end of the names.*]

(*a*) For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 35, 39, 41, 43 and 62.

the persons in whom such land, term or estate shall be vested cannot be found, or shall be under age, lunatic or of unsound mind (whether found such by inquisition or not), or otherwise incapable of acting, or shall be out of the jurisdiction or not amenable to the process of the Court of Chancery, or where by reason of the reduced number of trustees or other causes a valid appointment of new trustees cannot be made, or where by reason of the expenses incident to the appointment of new trustees, and the conveyance or assignment of such land, term or estate to such new trustees, it shall appear to the Court of Chancery, or to any judge of such court or of any court having jurisdiction with respect to such charity under this act, desirable so to do, such court or judge may order that such land, term or estate, be vested in such treasurer, and thereupon the same shall vest in such treasurer and his successors for all the estate and interest holden in trust for the charity as aforesaid, without any conveyance or assurance thereof (*b*); but no such vesting order as aforesaid shall be made in respect of any land, or term or estate as aforesaid, holden in trust as aforesaid, vested in a corporation, without the consent of the corporation; and no such vesting order shall take effect in respect of any copyhold land without the consent of the lord of the manor; and the Court of Chancery, or such judge, may direct such periodical or other payment as such court or judge may think fit, to be made to the lord of the manor, in compensation for fines or other profits which would have become due upon death or admittance of tenants. Proviso.

XLIX. It shall be lawful for any court or judge by whom respectively any such vesting order may have been made, or for any other court or judge having jurisdiction in the matter, if it shall so seem fit to such court or judge, from time to time to order that all or any part of the land, term or estate, which shall for the time being be vested in the said treasurer by virtue of any such vesting order as aforesaid, shall be devested, and that the same shall be vested in the acting trustees or trustee for the Orders may be made revesting land, &c. in the trustees of the charity.

(*b*) The vesting order may, therefore, if sought from a judge in equity, be obtained by application to hear at chambers under the 28th section; but if the subject be under consideration in open court, it may also be granted there.

time being of the charity; and such last-mentioned order shall operate to vest such land, term and estate in the trustees or trustee therein named without any conveyance or assurance (*c*).

Treasurer to be a bare trustee.

L. Subject to the orders and directions of the Court of Chancery or of any such judge, such treasurer shall be deemed a bare trustee, and shall permit the persons acting in the administration of the charity to have the possession, management and control of the trust estates, and the application of the income thereof, as if the same had been vested in them (*d*).

Judge may order trustees, &c. holding stock, &c. belonging to a charity subject to his jurisdiction to transfer same to official trustees.

LI. The secretary for the time being of the said board, and such other public officer or officers as the Lord Chancellor shall appoint, shall be official trustees of charitable funds, and where trustees or other persons having in their names, or in the name of any deceased person of whom they are representatives, in the books of the Bank of England, or of the East India or South Sea Company, or of any other public company, any annuities, stock or shares, or holding any government or parliamentary or other securities in trust for any charity, shall be desirous to transfer or deposit the same to or with the said official trustees in trust for such charity, or where any persons shall be desirous of transferring or depositing as aforesaid any annuities, stocks, shares or securities for discharging any legacy or charge given or made to or for the benefit of any charity, or where it shall appear to the Court of Chancery, or to any judge of such court, or of any district court of bankruptcy, or county court having jurisdiction under this act, that any annuities, stock, shares or securities held in trust for any charity ought, for the purpose of security or convenient administration, to be transferred or deposited as aforesaid, it shall be lawful for such court or judge to order the transfer or deposit of such annuities, stock, shares or securities to or with such official trustees (*e*).

(*c*) The devesting and revesting order may be obtained in the same way as the original vesting order is obtained under the 48th section.

(*d*) The trustee is therefore the mere instrument of the controlling power of the charity.

(*e*) So, also, in the case of funds or securities of the charity.

LII. The secretary of the said board shall keep separate accounts of the annuities, stock, shares and securities belonging to each separate charity, and the said official trustees shall pay the dividends or interest or income thereof to the trustees or persons acting in the administration of such charity, or otherwise dispose thereof, and transfer such annuities, stock, shares or securities (when occasion shall require), as the Court of Chancery, or any judge of such court, or of any district court of bankruptcy, or county court having jurisdiction under this act, or other lawful authority, shall direct (*f*). Secretary to keep separate accounts of funds of each charity.

LIII. It shall be lawful for any trustees or other persons having the custody of any deeds or muniments of or relating to such charity to deposit the same for security in a repository which may be provided by the said board, subject to any regulations to be made by the said board under this act. Trustees may deposit deeds, &c. for security in a repository provided by the board.

LIV. Where upon the application of any trustees or other persons concerned in the management or administration of any charity or interested in the benefits thereof (and after such examination or inquiry as the board may think necessary in relation thereto), or upon any report of an inspector, or information otherwise obtained by the said board under this act, with relation to any charity, it shall appear to the said board to be desirable to have a new scheme for the application or management of the charity, and such new scheme as contemplated or considered desirable by the board cannot be, or it shall in the opinion of the board be doubtful whether it can be, carried into complete effect by the Court of Chancery, or by any district or county court under the jurisdiction created by this act, or otherwise than by the authority of parliament, it shall be lawful for the said board in every such case provisionally to approve and certify such new scheme in the manner and subject to the regulations hereinafter mentioned. Power to board to frame schemes for the appropriation of charitable property to varied trusts.

LV. One month at least before any such new scheme shall be so provisionally approved, notice thereof shall be given in such manner as the board may in each case consider proper or expedient for ensuring due publicity, and every such notice shall contain such particulars of the proposed scheme as the said board think fit, and Notice to be given before approval of schemes, and objections may be submitted for the consideration of the board.

(*f*) See note to section 51.

as shall be deemed by the said board sufficient to show the nature of such scheme, and where the nature thereof cannot conveniently be shown in the said notice, such notice shall refer to some convenient place within the parish or district, and to the office in London of the registrar of county courts judgments, where a copy of the proposed scheme shall be deposited and may be inspected, and every such notice shall require any objections to such scheme to be stated or transmitted to the said board or their secretary within one month from the time when the notice shall have been given.

Board may alter or modify or approve of schemes.

LVI. If after such notice as aforesaid any objections or suggestions shall be made, the board shall consider the same, and may thereupon, if to them it shall seem fit, alter or modify the scheme according to any such objections or suggestions; and after all such objections and suggestions, if any, have been disposed of, or if no such objections or suggestions shall have been made, the board, in case they shall not think fit to refer such scheme to an inspector under the provision next hereinafter contained, may proceed to approve such scheme, and to certify the same in manner hereinafter mentioned.

The matter of schemes may be referred to an inspector for local inquiry.

LVII. Upon the requisition of any person interested in the charity in question (in case the said board after due consideration shall be of opinion that there are sufficient grounds for complying with such requisition), or in any other case, if the said board shall consider it desirable, the matter of any scheme in question may be referred by the said board to one of their inspectors, and such inspector shall thereupon proceed to make a local inquiry and examination into the matter of the scheme in question, and for the purposes of such inquiry such inspector may hold a sitting or sittings in some convenient place in the parish or one of the parishes or the district to or in which respectively the charity in question is wholly or partially situated or is administered, and may take and receive any evidence and information, and hear and inquire into any objections or questions relating to the scheme or charity in question, and may from time to time adjourn any such sitting, and public notice shall be given by such inspector of every such sitting (except an adjourned sitting) fourteen days at the least before the holding thereof, in such other mode as in the judgment of the said board shall be sufficient to ensure publicity.

Inspectors to report the result of inquiry to the board.

LVIII. Every inspector to whom any such matter shall be referred shall report in writing to the said board the result of his inquiry, and whether in his opinion the scheme in question should be approved with or without any alteration or modification thereof, and such report shall specify or indicate the alterations (if any) which such inspector shall consider desirable, with the reasons for the same, and also the nature of the objections (if any) which shall have been made to the scheme, and the opinion of the said inspector thereon, and the said board shall consider such report, and if, as the result of such report or after further inquiry, they shall be satisfied therewith, they may proceed to approve the scheme in question either with or without any alteration, and to certify the same in manner hereinafter mentioned.

Schemes when approved to be certified by board. Copy of such certificate to be deposited in the parish or district, and notice given.

LIX. Every scheme to be approved by the said board shall be certified by them, and for that purpose shall be embodied in a certificate to be made by the said board, and sealed with their seal; and in every case a copy of such certificate shall be deposited in some convenient place within the parish or one of the parishes or the district in which the charity in question shall wholly or partially be situated or administered, and at the office in London of the registrar of county courts judgments, and a notice shall also be given, in such manner as the board shall direct, which notice shall refer to the certificate so deposited, and shall state the intention of the board to proceed with the scheme thereby certified.

Annual report to be laid before parliament, which shall set forth all the schemes approved.

LX. The said board shall in the month of February in every year make a report to her Majesty of all their proceedings during the preceding year up to the 31st day of December then last, and such report shall, within fourteen days after the making thereof, be laid before both Houses of Parliament, if parliament be then sitting, or otherwise within fourteen days after the meeting thereof; and in such report the said board shall specially distinguish and set forth in full all the schemes (if any) approved by them under the provisions lastly hereinbefore contained, together with the grounds of such their approval, and the objections (if any) which have been made thereto, and all proceedings had in respect of such objections and the grounds on which any such objections have been overruled; and in case it shall be enacted by any act of parliament that any such scheme or schemes

so certified shall be confirmed and take effect, either with or without any alterations or modifications thereof respectively, every such act shall be deemed a public general act.

Accounts of trustees of charities to be delivered to the clerks of county courts, clerks of the peace and to the board.

LXI. The trustees or persons acting in the administration of every charity shall, in books to be kept by them for that purpose, regularly enter or cause to be entered full and true accounts of all money received and paid respectively on account of such charity, and on or before the 25th day of March in every year, or on or before such other day as shall or may be fixed and appointed for that purpose by the said board, shall cause a statement in writing to be made of the income and revenues, whether actually paid or then due, and the actual receipts and expenditure of such charity for the year ending on the 31st day of December then next preceding, or on some other convenient day to be fixed and appointed for that purpose by the said board, and also a balance sheet containing a clear statement of the balance of such account, which statement and balance sheet respectively shall be certified under the hand of some one or more of such trustees or persons (and audited by the auditor of such charity, if any there be); and as to every charity whose gross annual income for the time being shall not exceed 30*l.*, every such statement and balance sheet respectively, or a duplicate or true copy thereof respectively, shall be delivered or sent by such trustees or persons free of charge to the clerk of the county court or some one of the county courts (if more than one) to whose jurisdiction such charity may be subject under this act (in case such charity be subject to the jurisdiction of any county court under this act), or if such charity be not subject to the jurisdiction of any county court, then to the clerk of the county court for the district or any one of the districts (if more than one) wherein or nearest adjoining whereto such charity is established, or the property thereof (in whole or in part) is situate or administered and distributed; and as to every charity whose gross annual income for the time being shall exceed 30*l.*, every such statement and balance sheet, or a duplicate or true copy thereof respectively (unless the said board shall otherwise direct), shall be delivered or sent free of charge to the clerk of the peace for the county or the division of the county, or some one of the counties or

divisions of counties (if more than one) in which the charity is established, or the property thereof is wholly or partially situated or administered and distributed; and every such statement and balance sheet, or a duplicate or true copy thereof respectively, shall be kept and registered without fee or reward by the registrar of county courts judgments or the clerk of such county court, and the clerk of the peace of such county or division respectively, and shall be open to the inspection of all persons, at all seasonable hours, on payment of the sum of 1*s.* to the registrar or clerk for every such inspection; and any person may require and have a copy of any such statement and balance sheet, or of any part thereof, paying therefor to such registrar or clerk after the rate of 2*d.* for every seventy-two words or figures; and a duplicate or copy of every such statement and balance sheet to be made according to the foregoing provision, so certified and audited as aforesaid, shall be delivered or transmitted, through the post or otherwise, free of charge, by such trustees or other persons, to the said board, on or before the said 25th day of March in every year, or such other day as may be fixed and appointed by the said board as aforesaid; and the said board may from time to time by any order direct that the statement and balance sheet, or a duplicate or true copy thereof respectively, of the accounts of any charity whose gross annual income exceeds 30*l.* shall be delivered or sent to the clerk of the county court in the same manner as if the income of such charity did not exceed 30*l.*; and the said board may make and give such further and other orders and directions in relation to the delivery and publication of such accounts, and the form thereof, as they may think fit, which directions and order shall be obligatory on and obeyed by all such trustees and persons as aforesaid.

Exemptions from the operation of act.

LXII. This act shall not extend to the Universities of Oxford, Cambridge, London or Durham, or any college or hall in the said Universities of Oxford, Cambridge and Durham, or to any cathedral or collegiate church, or to any building registered as a place of meeting for religious worship with the registrar general of births, deaths or marriages in England and Wales, and bonâ fide used as a place of meeting for religious worship; nor shall this act, for the period of two years from the passing thereof, extend or be in any manner applied to charities or

institutions, the funds or income of which are applicable exclusively for the benefit of persons of the Roman Catholic persuasion, and which are under the superintendence or control of persons of that persuasion, nor shall this act extend or be applied to the commissioners of Queen Anne's bounty, or to the British Museum, or to any friendly or benefit society, or savings bank, or any institution, establishment or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this act; and nothing in this act shall subject the funds or property of any missionary or other similar society, or the missionaries, teachers or officers of such

Provisions as to charities supported partly by voluntary subscriptions.

society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales, to the jurisdiction of the said board: provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter or other schools (*g*).

Exempted charities may petition commissioners to have benefit of act.

LXIII. It shall be lawful for any of the charities exempted from the operation of this act, by order or resolution duly made in conformity with the constitution or rules of such charity (and which in that case only shall be binding), to apply by petition to the commissioners to have the benefit of this act either generally or as to any of the provisions herein contained; and such petition shall be under the seal of such charity if incorporated, and if not, then under the hands of the major part of the trustees and governing body of such charity; and in such case it shall be lawful for the commissioners, if they shall think fit, to make an order in conformity with such application, and such charity shall thenceforth be entitled to and be bound by all the provisions of this act, if admitted generally thereto, or by such of the enactments thereof as shall be mentioned and specified in such order of the commissioners, but in either case in the same manner as if such charity had not been exempted from this act, or such exemption had not extended to the enactments specified in such order.

Disputes among members of exempted charities may be referred to arbitration of commissioners.

LXIV. Provided also, that if any question or dispute shall arise among the members of any charity exempted from the operation of this act in relation to any office, or the fitness or disqualification of any trustee or officer, or his election or removal, or generally in relation to the management of the charity, it shall be lawful for two-thirds of the members present at any special meeting, duly convened by notice for the purpose in the same manner in which meetings of such charity are by the rules thereof appointed to be held and convened, to refer such question or dispute to the arbitration of the commissioners, who shall accept such reference and act therein as arbitrators, and their award shall be final, and may be made a rule of her Majesty's High Court of Chancery.

Legal estate of lands now vested in municipal corporations

LXV. The legal estate in all lands which at the time of the passing of the act of the session holden in the fifth and sixth years of King William the Fourth, chapter

(*g*) For other exemptions, wholly or partially, see sections 15, 17, 18, 30, 35, 39, 41, 43 and 46.

on charitable trusts to be vested in trustees. 5 & 6 Will. 4, c. 76.

seventy-six, was vested in the body corporate of any borough which became subject to the provisions of the said act, or in any one or more of the members of such body corporate, in his or their corporate capacity, solely or together with any person or persons elected solely by such body corporate, or solely by any particular number, class or description of members of such body corporate, in whole or in part in trust or for the benefit of any charitable uses or trusts whatsoever, and which legal estate shall not have been since duly conveyed or assured to and vested in the trustees appointed by the Lord High Chancellor under the provisions of the said act, or such of them as shall be surviving and continuing trustees, or otherwise lawfully conveyed, alienated or disposed of by such body corporate or member or members thereof, shall from and immediately after the passing of this act, and without any actual conveyance, assignment or other assurance thereof, be vested in the trustees so appointed, or such of them as shall be surviving and continuing trustees under such appointment as aforesaid, according to the respective estates and interests therein, and subject to such and the same charges and incumbrances and upon such and the same trusts as the same were respectively subject to previously to such vesting; and in every case, upon the death, resignation or removal of any of the trustees, and upon any appointment of any new trustee or trustees respectively, the legal estate in the same lands, and in all other lands subject to any such charitable uses or trusts which may for the time being be vested in the trustees or any of them, or in any persons, or the heirs or devisees of any person who may have died, resigned or been removed, shall vest in the persons who after such death, resignation or removal, and such appointment of such new trustee or trustees respectively, shall continue or be the trustees for the time being, without any conveyance or assurance whatsoever.

Interpretation of terms.

LXVI. In the construction of this act, except where the context or other provisions of the act may require a different construction, the expression "Court of Chancery" shall mean and include the Master of the Rolls and every judge of the Court of Chancery in England; the expression "Lord Chancellor" shall mean and include the Lord Chancellor of Great Britain and the Lord Keeper and Commissioners of the Great Seal of Great Britain for the time being; the expressions "district

court of bankruptcy" and "district court" shall mean and include every district of bankruptcy established or to be established under the act of the fifth and sixth years of the reign of her present Majesty, chapter twenty-two, or under any other act or acts passed or to be passed for the alteration, or amendment or the extension of the same act, or for the establishment of any district court or courts of bankruptcy in England or Wales, and every commissioner or judge of every such district court; the expression "county court" shall mean and include every county court holden or established or to be holden or established under the act of the ninth and tenth years of her Majesty, chapter ninety-five, or any act or acts passed or to be passed for the alteration or extension of the same act, and every judge of any such court; the expression "charity" shall mean every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview or interpretation of the statute of the forty-third year of Queen Elizabeth, chapter four, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction; the expression "trustee" of any charity shall mean and include every person and corporation seised or possessed of or entitled to any real or personal estate, or any interest therein, in trust for or for the benefit of such charity, or all or any of the objects or purposes thereof, and every member of any such corporation; and the expression "the board" shall mean the said charity commissioners sitting as a board under this act; and the expression "endowment" shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon or interest therein, and all stocks, funds, monies, securities, investments and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof; and the expression "land" shall extend to and include manors, messuages, buildings, tenements and hereditaments, corporeal and incorporeal, of every tenure and description.

Extent of act.

LXVII. This act shall not extend to Scotland or Ireland.

Short title.

LXVIII. This act may be cited as "The Charitable Trusts Act, 1853."

FIRST REPORT

OF

THE CHARITY COMMISSIONERS

FOR

ENGLAND AND WALES;

With An Appendix.

(*Made in pursuance of the Act* 16 *&* 17 *Vict. c.* 137.)

1854.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

May it please your Majesty,

We, the Charity Commissioners for England and Wales, are required by the provisions of "The Charitable Trusts Act, 1853," to make a report to your Majesty of our proceedings up to the 31st day of December last.

Our appointments, which your Majesty was pleased to make on the 22d day of October last, enabled us to enter immediately upon the discharge of our functions, but numerous arrangements for the construction of our official establishment and the distribution of its duties occupied a considerable time, and we could not obtain more than a very limited efficiency for the active purposes of our commission before the month of December. The present report of our proceedings is therefore confined to a very short period.

We applied ourselves at once to making the provisions and requirements of the act which we considered to be of particular importance efficiently and extensively known, and besides advertising in the Gazette, we distributed about 15,000 circulars for that purpose.

Before the end of March next we have to expect, in compliance with the provisions of the act, returns of the revenues and of the receipts and expenditure of

the body of charities in England and Wales, probably amounting to not less than 40,000 in number.

It has appeared to us that we could not usefully or effectively attempt to enter upon an indiscriminate and unsolicited interference in the affairs of this vast number of charities, but that we should best discharge our duty by directing our attention to cases brought to our notice by particular application, or respecting which we have possessed any special information, awaiting in other cases the returns referred to for our future and principal guidance. It is by comparing the accounts with the documents which constitute and explain the endowment that we hope to be able to ascertain, to a considerable extent, in what cases and in what manner it may be our duty to interfere.

Previously, however, to the 31st of December last, application had already been made to us for assistance or advice, in 340 cases, which have engaged us in a large correspondence, and these applications are daily increasing in number.

We have made some Minutes, in obedience to the directions of the act, for our own guidance and that of our inspectors (which will be found in an Appendix), but they may probably require to be extended when the practical details of our duties have more fully developed themselves.

We have also drawn up and placed in the Appendix some general Regulations and printed Forms of application to the Board for the guidance of applicants, which will be supplied to any persons desirous of making use of them. These forms are necessarily experimental, and are yet to be applied in working the entirely new jurisdiction created by the act. They may also, therefore, possibly require future additions and alterations. But in their present shape we trust that they will give facilities to all persons who may desire to take advantage of the act.

Given under our hands the 14th day of February, 1854.

(Signed) P. ERLE.
JAMES HILL.
RD. JONES.

APPENDIX TO REPORT,

CONTAINING

No. 1.—General Minutes relating to the Proceedings of the Commissioners and their Inspectors;

No. 2.—Regulations and Instructions concerning Applications to the Board, with Forms of Application, &c.

No. 1.

General MINUTES relating to the Proceedings of the Commissioners and their Inspectors.

1. The commissioners attending daily at their office for the despatch of business will sit as a board as often as occasion shall require, and, notwithstanding any adjournment, will resume their sittings when necessary.

2. All communications, papers and documents addressed or sent to the commissioners or their secretary shall be forthwith registered, and laid before the board.

3. A separate register shall be kept of all deeds, muniments or documents relating to charities which may be deposited with the board.

4. Registers shall be kept of all letters, instruments and documents sent from the office.

5. A summary or breviate shall be made, and kept in the office, of the proceedings in every matter brought under the consideration of the commissioners.

6. The seal of the commissioners shall not be affixed to any document except at a sitting of the board.

7. As a general rule, the board will require applications with reference to any charity to be made in writing, and signed by the applicants; but the board, without any precedent application to them, will institute inquiries and exercise their powers with respect to any charity where it shall appear to them expedient to do so.

8. As a general rule, applications will be proceeded with in the order in which they are received, except where the board shall (in cases of urgency or for any special reason) think fit to depart from this rule.

9. All official correspondence shall be carried on in the name of the secretary.

10. Examinations and inquiries shall be conducted, as far as may be found practicable, by correspondence at the

office of the commissioners, or by personal communications there made.

11. Every case in which local examination and inquiry shall be requisite shall be referred by the board to an inspector.

12. Upon every such reference a copy of the minute of the board relating thereto, signed by the secretary, shall be delivered to the inspector to whom the reference is made, and such copy shall be his authority for prosecuting the examination and inquiry thereby directed.

13. Every such examination and inquiry shall be made with such public and particular notices, and according to such general conditions as the board may prescribe, and, subject thereto, in such manner as the inspector, bearing in mind that the object is to ensure the most just and beneficial application of the charity, shall think fit.

14. The general mode of conducting the examination and inquiry will be left to the judgment and discretion of the inspector, who shall be at liberty to avail himself of all such evidence and information as he may be able to obtain, and to exercise for that purpose all the available powers of the act, except where the board shall have prescribed any particular limitation of the inquiry or of the exercise of such powers.

15. The inspector shall report to the board the result of every such examination and inquiry, and shall in his report mention the nature of the evidence and information obtained by him, and whether taken on oath or not.

(Signed) P. ERLE.
JAMES HILL.
RD. JONES.

No. 2.

REGULATIONS and INSTRUCTIONS concerning Applications to the Board under "The Charitable Trusts Act, 1853," (16 *&* 17 *Vict. c.* 137).

I.—*Applications for Inquiry or Relief respecting any Charity.*

1. Any person or persons having reasonable grounds may apply to the board for inquiry or relief with respect to any charity.

2. The application should be in writing, addressed to the commissioners, and signed by the applicants, who

should add their respective professions, occupations or qualities and residences.

3. No precise form is necessary; but the usual designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered, and the names, professions or occupations and residences of the trustees or persons acting in the management or administration, should be stated in all cases. Such facts and circumstances as will sufficiently explain the nature and object of the application should also be stated.

4. A separate application should be made for each charity, except where several charities are administered together under one scheme or system of management.

5. On receipt of an application, the board will make such inquiries and adopt such proceedings as the case may require.

6. A form of initiatory application is subjoined. (See Appendix, No. 1.)

II.—*Inquiries to be instituted by the Board.*

1. When an examination and inquiry into any charity is considered necessary, the board will communicate with the trustees or other persons capable of giving the required information.

2. Forms of inquiry are subjoined. (See Appendix, Nos. 2, 3, 4, 5.)

III.—*Applications for the Opinion, Advice or Direction of the Board.*

1. An application may be made by any trustee or other person having any concern in the management or administration of any charity, for the opinion, advice or direction of the board, in the matter of the trust.

2. Every such application should contain concise statements, and, as far as conveniently may be, in numbered paragraphs, of all the material facts and circumstances, upon which the opinion, advice or direction of the board is desired.

3. It should be stated whether the application is made with the concurrence of all the trustees or persons concerned in the management or administration of the charity, or with the dissent of any and what proportion of them.

4. The application should be accompanied by any documentary evidence which will explain or substantiate the statements.

5. The board may require the statements to be explained

and altered, in point of form, in such manner and as often as may be thought necessary.

6. The board may also, at any time, require the statements to be verified by the statutory declaration of the applicants or any of them.

7. On the application being approved, a duplicate will generally be required to be sent, which will be returned to the applicant with the opinion, advice or direction of the board appended thereto, and the original application will be retained by the board and registered.

8. A form of application is subjoined. (See Appendix, No. 6.)

IV.—*Applications for an Order or Certificate of the Board authorizing the Institution of any Suit or other Proceeding before any Court or Judge.*

1. Any person applying for an order or certificate of the board authorizing the institution of any suit or other proceeding before any court or judge, should transmit to the Board a notice and statement in writing, setting forth whether or not he is a trustee or person administering or claiming to administer, or interested in the charity, or an inhabitant of the parish or place within which the charity is administered or applied; the amount of the gross annual income of the charity; and all the other material facts and circumstances of the case; and explaining the nature and objects of the proposed suit or other proceeding.

2. The facts and circumstances should be stated in numbered paragraphs, as far as conveniently may be.

3. Where the object of the proposed proceeding is the removal of trustees, their names, descriptions and residences, and the reasons for their proposed removal, should be stated.

4. The names, descriptions and residences of the trustees proposed to be appointed should also be stated.

5. Where the object of the proposed proceeding is a new scheme, the notice and statement should contain information as to the past administration of the charity, and its results, and the nature and provisions of the proposed scheme.

6. In proposing schemes care should be taken to deviate as little as possible from the original purposes and intentions of the founder.

7. The board may require the statement to be explained and altered in point of form in such manner and as often as may be thought fit.

8. The board may also require the statement to be verified by statutory declaration or otherwise.

9. A form of application is subjoined. (See Appendix, No. 7.)

10. Where the proposed proceeding is to be taken under the special jurisdiction created by the act, for the establishment or alteration of a scheme or the appointment or removal of any trustee, notice must be given in the mode which will be directed by the board.

11. Forms of notices, and supplementary forms for giving effect thereto, are subjoined. (See Appendix, Nos. 8, 9, 10, 11, 12, 13.)

12. When the board shall have been satisfied that the proposed proceeding is proper, and that any required notice has been duly given, the requisite order or certificate will be issued to the applicant, or to such other person as may be approved.

V.—*Applications for the authority of the Board to grant building, repairing, improving, mining or other Leases, or to cut Timber, or make Roads or other improvements.*

1. Applications for the authority of the board to grant building, repairing, improving, mining or other leases, or to cut timber or make roads or other improvements, can only be made by the trustees or persons acting in the administration or management of any charity or the estates or property thereof.

2. A form of application for authority to grant a lease is subjoined. (See Appendix, No. 14.)

VI.—*Applications for the authority of the Board to effect Sales or Exchanges.*

1. Applications for the authority of the board to effect sales or exchanges can only be made by trustees or persons acting in the administration of any charity.

2. Forms for these purposes are subjoined. (See Appendix, Nos. 15 and 16.)

(Signed) P. Erle.
James Hill.
Rd. Jones.

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Note.—*Any of the following Forms may be obtained separately, on application at the Office of the Commissioners in London.*

No. 1.—*Form of Initiatory Application.*

To the Charity Commissioners for England and Wales.

In the matter of the Charity called*
in the of
in the county of

*Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

The following statements are submitted for the consideration of the Board:—

The applicants should state here concisely and, as far as conveniently may be, in numbered paragraphs, the circumstances and the particular objects of the application.

1.

2.

3., &c.

I (*or* we) declare that the above statements are in all

respects true, according to my (*or* our) information and belief.

Dated this day of 185 .

*

* The applicants should here sign their names, adding their professions or occupations and residences.

No. 2.—*Form of General Inquiry.*

Charity Commissioners for England and Wales.

In the matter of the Charity called† in the of in the county of

† Insert the usual name or designation of the charity, and the name of the parish, township, or place for the benefit whereof the charity was founded, or in which it is administered.

Information is required by the board upon the following points:—

1. The name of the founder of the charity and the date and description of the deed, will, or other instrument by which it was founded, and a short statement of the material contents.

2. Whether there has been any augmentation of the endowment, and, if so, by whom, and how made? And whether there is any scheme of management or other modification of the original trusts; and, if so, the date and particulars thereof?

3. In whose custody or possession, or under whose control, the deeds or instruments of foundation, and any other instruments affecting the charity, now are?

4. The description, local situation, and other particulars of the endowments, property, and possessions of the charity, whether consisting of real or personal estate.

5. How the lands and real property (if any) belonging to the charity are let or occupied; and the dates, reservations and terms of the several leases or lettings?

6. How, and in what names, the personal property (if any) is invested?

7. The gross annual or other income of the charity from every source, distinguishing the several sources.

8. To what objects and in what manner the income of the charity is applied?

9. The names, addresses and descriptions of the present trustees of the charity, or of the persons who act in the management or administration thereof.

10. How and under what authority and when the present trustees were appointed? Or, from what period the persons now acting in the management or administration of the charity have so acted?

11. Whether any conveyance or transfer of the charity property has been made to the present trustees, and, if so, the nature and date of such conveyance or transfer?

Any other statements or observations which may be necessary or proper for more fully explaining the circumstances of the charity should be added.

I declare that the above statements are in all respects true according to the best of my information and belief.

Dated this day of 185 .

*

*The informant should here sign his name, adding his profession or occupation and residence.

No. 3.—*Form of Inquiry as to Rentcharges withheld.*

Charity Commissioners for England and Wales.

In the matter of the Charity called† in the of in the county of

†Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

Information is required by the Board upon the following points:—

1. The present trustees or other persons by whom the rentcharge should be received and distributed.

2. How the present trustees were appointed, and the dates of their several appointments?

3. Whether the rentcharge has been legally vested in the present trustees?

4. The date and other particulars of the deed, will, or other instrument by which the rentcharge was created, and of that by which it was devoted to the charity?

5. Whether the property subject to the rentcharge is described in the instrument creating it?—and, if so, in what manner?—or, what is the description of the property reputed to be now subject to the rent-charge?

6. Whether the deed or instrument creating the rentcharge and any other subsequent deeds or instruments relating thereto are in the possession of the trustees? If not, what is known respecting them should be stated.

7. Whether the rentcharge was usually paid by the owner of any, and what, particular property during any, and what, period? And what proof can be given of such payment?

8. When, and by whom, was the last payment of the rentcharge made?

9. The name and address of the present owner of the particular property considered to be subject to the rentcharge; and whether he derives his title thereto from any person by whom the rentcharge is known to have been previously paid?

10. What reasons (if any) are assigned by the present owner for refusing payment of the rentcharge?

11. When the last demand for such payment was made?

12. Whether any, and what, proof of the identity of the property subject to the rentcharge can be obtained by reference to old maps or surveys, or parochial assessments, or other documentary evidence, or from the testimony of any of the inhabitants, or by any other means?

I declare that the foregoing statements are true according to the best of my information and belief.

Dated this day of 185 .

*

* The informant should here sign his name, adding his profession or occupation and residence.

No. 4.—*Form of Inquiry as to Endowed Grammar Schools.*

Charity Commissioners for England and Wales.

In the matter of † School, in the of in the county of

† Insert the usual name or designation of the school, and of the parish, township or place in which it is situate.

Information is required by the Board upon the following points:—

1. The date and particulars of the foundation of the school.

2. The particulars of the estates and property forming the endowment.

3. The amount of the average gross annual income from every source, distinguishing each source.

4. The names, professions or occupations and residences of the governors, trustees, or managers of the school; how they were appointed, and the dates of their appointments.

5. The means for the renewal or continuance of the trust or management, upon the occurrence of any vacancy.

6. The name and residence of the visitor, if any?

7. Whether there are any statutes or regulations for the conduct or management of the school? (If so, a copy of the same should be sent, and it should be stated by what authority they were established and in whom any power of revision or alteration of them is vested.)

8. The names and ages of the masters, the dates of their appointments, and by whom and under what authority they were respectively appointed.

9. The particulars of the qualifications and duties of each master.

10. The particulars of the salary and emoluments of each master.

11. Whether a residence is provided for the masters?

12. Whether the masters are resident and devote their whole time to the duties of their offices? If not, state what other occupations they have, the time engaged and the emoluments derived from them.

13. Whether the duties of the masters are performed to the satisfaction of the governors or trustees?

14. Whether any provision is made for the retirement of the masters on account of ill health, old age, or otherwise, or for their removal for any other reason?

15. The average number of boys attending the school for the last three years, distinguishing the free boys from the others.

16. The present number of boys attending the school,—making the same distinction.

17. By whom the free boys are appointed?

18. The qualifications for appointment as to

age, parentage, residence and condition in life, and up to what age boys are allowed to remain in the school.

19. The nature of the education afforded by the school.

20. Whether instruction in the catechism and doctrines of the Church of England is insisted upon in all cases, without reference to the religious tenets of the parents or guardians of the boys?

21. Whether any entrance fee or other charge is made for the boys termed "free boys?" If so, the particulars and amount of each fee or annual or other charge for each boy.

22. How books and stationery are provided and paid for?

23. Whether the free boys derive any other benefit from the charity besides the instruction at the school? If so, state the nature and particulars of such benefit.

24. Whether there are any exhibitions or scholarships for the benefit of the school? If so, their number, and the value and duration and other particulars of each.

25. By whom such exhibitions or scholarships are awarded; the present number of exhibitioners or scholars; and the average number of such exhibitioners or scholars during the last three years?

26. Whether the exhibitioners or scholars are taken from the free and other boys indiscriminately, and whether they are appointed after any examination as to their respective merits; and in that case, by whom and in what manner such examination is conducted?

27. The nature and capabilities of the school-buildings and masters' residences, if any, and their condition as to repairs?

Any other information or particulars respecting the school with which the commissioners should be made acquainted, should be added.

I declare that the above statements are in all respects true, according to my information and belief.

Dated this day of 185 .

*

*The informant should here sign his name, adding his profession or occupation and residence.

No. 5.—*Form of Inquiry as to Endowed National, British, Infant and other Schools.*

Charity Commissioners for England and Wales.

In the matter of * school
in the of
in the county of

*Insert the usual name or designation of the school, and of the parish, township or place in which it is situate.

Information is required by the Board upon the following points:

1. The date and particulars of the foundation of the school.

2. The particulars of the estates and property forming the endowment.

3. The amount of the average gross annual income from every source, distinguishing each source.

4. The names, occupations or professions and residences of the trustees or managers of the school, and of the visitor, treasurer and secretary, if any.

5. The means for the renewal or continuance of the trust or management upon the occurrence of any vacancy.

6. Whether there are any rules or regulations for the conduct or management of the school? (If so, a copy of the same should be sent.)

7. The names and ages of the schoolmaster and schoolmistress, the dates of their appointments, and by whom or under what authority they were respectively appointed, and for what period the appointments are held?

8. Whether there is any provision for dismissing the schoolmaster or schoolmistress, and if so, in whom the power of dismissal rests.

9. The particulars of the qualifications and duties of the schoolmaster and schoolmistress.

10. The particulars of the salaries and emoluments of the schoolmaster and schoolmistress.

11. Whether residences are provided for them?

12. Whether the schoolmaster and schoolmistress are resident, and devote their whole time to the duties of their office? If not, state what other occupation they have, the

time engaged and the emoluments derived therefrom.

13. Whether the duties of the schoolmaster and schoolmistress are performed to the satisfaction of the trustees or managers?

14. Whether there is any provision for the retirement of the schoolmaster or schoolmistress on account of ill health, old age or otherwise?

15. The average number of children attending the school for the last three years: distinguishing boys from girls.

16. The present number of children attending the school: making the same distinetion.

17. The qualifications of children to be admitted to the school as to age, parentage, residence and condition in life; and to what age they are allowed to remain in the school.

18. The nature of the education afforded by the school.

19. Whether instruction in the catechism and doctrines of the Church of England is insisted upon in all cases, without reference to the religious tenets of the children's parents or guardians?

20. Whether any entrance fee or other charge is made for admission of children into the school, and, if so, the particulars and amount thereof?

21. How books and stationery are provided and paid for?

22. The nature and capabilities of the school buildings, and schoolmaster's and schoolmistress's residences (if any), and their condition as to repairs.

Any other information or particulars respecting the school with which the commissioners should be made acquainted, should be added.

I declare that the above statements are in all respects true according to my information and belief.

Dated this day of 185 .

* The informant should here sign his name, adding his profession or occupation and residence.

No. 6.—*Form of Application for the Opinion, Advice or Direction of the Board.*

To the Charity Commissioners for England and Wales.

In the matter of the charity called *

in the of

in the county of

The undersigned being †

submits the following statement;

1.

2.

3.

4., &c.

Under the foregoing circumstances the undersigned makes application to the board for their on the following points;

That is to say,

1st.

2nd.

I declare that the above statement is in all respects true according to my information and belief.

Dated this day of 185 .

‡

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

† A trustee or person concerned in the management or administration of the charity.

State here concisely and, as far as conveniently may be, in numbered paragraphs, the material facts and circumstances of the case.

Opinion, advice, or direction.

State here, as far as conveniently may be, in numbered paragraphs, the specific points upon which the opinion, advice, or direction is desired.

‡ The applicant should here sign his name, adding his profession or occupation and residence.

No. 7.—*Form of Application for an Order or Certificate of the Board authorizing any Suit or other Proceeding before any Court or Judge.*

To the Charity Commissioners for England and Wales.

In the matter of the charity called *
in the of
in the county of

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

The undersigned, being †

† The applicant should here state whether or not he is trustee or person administering or claiming to administer, or interested in the charity, or an inhabitant of the parish or place within which the charity is administered or applicable.

submits the following notice and statement:

1. The gross annual income of the above-mentioned charity amounts to

2.

3, &c,

State here concisely and, as far as conveniently may be, in numbered paragraphs, all the material facts and circumstances of the case.

Under the foregoing circumstances the undersigned is desirous of instituting proceedings for effecting the following objects;
That is to say,
1st.

2nd, &c.

State here, as far as conveniently may be in numbered paragraphs, the specific objects for which proceedings are proposed to be taken.

The undersigned accordingly requests the board to issue an order or certificate authorizing him to make an application to

Describe the court or judge.

for effecting the above objects.

I declare that the above statement is in all respects true according to my information and belief.

Dated this day of 185 .

‡

‡ The applicant should here sign his name, adding his profession or occupation and residence.

No. 8.—*Form of Notice of Application for the Removal of Trustees, the Appointment of new Trustees and the Establishment of a Scheme.*

In the matter of the charity called *

in the of
in the county of

Notice is hereby given, that, with the sanction of the Charity Commissioners for England and Wales, application is intended to be made to

on or after the day of for the following objects; that is to say,

The removal of

from being a trustee (*or* trustees) of the above-mentioned charity:

The appointment of new trustees of such charity:

And the establishment of a scheme for the regulation thereof.

The following persons are intended to be proposed as new trustees of the said charity; that is to say,

The proposed scheme may be inspected, without charge, on any day, excepting Sunday, during the next days between the hours of ten and in the forenoon and and in the afternoon, at

and between the hours of eleven and three at the office of the said commissioners at London.

Any person desirous of making objection to the removal of the said or to the appointment of all or any of the proposed new trustees, or of proposing any other trustee or trustees, or of making objection to the proposed scheme, or of proposing any alteration thereof, will be at liberty to do so, and notice in writing of his intention in that behalf may be transmitted to the said commissioners, at their said office, within days from the date hereof.

Dated this day of 185 .

†

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

Describe the judge of the Court of Chancery, or the county or other court, as the case may be.

Insert the date, which must not be less than fifteen days after the affixing of the notice.

Name or names of the trustee or trustees to be removed.

Insert the names, descriptions and residences of the proposed new trustees.

Describe the place within the above-mentioned parish or township where the scheme may be seen.

Insert the date.

† Signatures, occupations and residences of the persons intending to make the application.

No. 9.—*Form of Notice of Application for the Removal of Trustees and the Appointment of new Trustees.*

In the matter of the charity called * in the of in the county of .

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

Notice is hereby given, that, with the sanction of the Charity Commissioners for England and Wales, application is intended to be made to

Describe the judge of the Court of Chancery, or the county or other court, as the case may be.

on or after the day of for the following objects; that is to say,

Insert the date, which must not be less than fifteen days after the affixing of the notice.

The removal of

Name of the trustee or trustees to be removed.

from being a trustee (*or* trustees) of the above-mentioned charity, and the appointment of new trustees of the same.

The following persons are intended to be proposed as such new trustees; that is to say,

Insert the names, residences and descriptions of the proposed trustees.

Any person desirous of making objection to the removal of the said or to the appointment of all or any of the proposed new trustees, or of proposing any other trustee or trustees, will be at liberty to do so, and notice in writing of his intention in that behalf may be transmitted to the said commissioners at their office at London, within days from the date hereof.

Dated this day of 185 .

Insert the date.

*

* Signatures, occupations and residences of the persons intending to make the application.

No. 10.—*Form of Notice of Application for the Appointment of Trustees.*

In the matter of the charity called * in the of in the county of

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit of which the charity is founded, or in which it is administered.

Notice is hereby given, that, with the sanction of the Charity Commissioners for England and Wales, application is intended to be made to

Describe the judge of the Court of Chancery, or the county or other court, as the case may be.

on the day of for the appointment of trustees of the above-mentioned charity.

Insert the date, which must not be less than fifteen days after the affixing of the notice.

The following persons are intended to be proposed as trustees thereof; that is to say,

Insert the names, descriptions and residences of the proposed trustees.

Any person desirous of making objection to the appointment of all or any of the proposed trustees, or of proposing any other trustee or trustees, will be at liberty to do so, and notice in writing of his intention in that behalf may be transmitted to the said commissioners, at their office at London, within days from the date hereof.

Insert the date.

Dated this day of 185 .

*Signatures, occupations and residences of the persons intending to make the application.

*

No. 11.—*Form of Notice of Application for the Establishment of a Scheme.*

In the matter of the charity called †
in the of
in the county of

† Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

Notice is hereby given, that, with the sanction of the Charity Commissioners for England and Wales, application is intended to be made to

Describe the judge of the Court of Chancery, or the county or other court, as the case may be.

on the day of for the establishment of a scheme for the regulation of the above-mentioned charity.

Insert the date, which must not be less than fifteen days after the affixing of the notice.

The proposed scheme may be inspected by any parishioner or person interested in the said charity, without charge, on any day, excepting Sunday, during the next days, between the hours of ten and in the forenoon and and in the afternoon, at

Describe the house or place within the above-mentioned parish or township where the scheme may be seen.

and between the hours of eleven and three at the office of the said commissioners, at , London.

Any person desirous of making objection to the proposed scheme, or of proposing any alteration thereof, will be at liberty to do so, and notice in writing of his intention in that behalf may be transmitted to the said commissioners, at their said office, within days from the date hereof.

Insert the date.

Dated this day of , 185 .

‡ Signatures, occupations and residences of the persons intending to make the application.

‡

No. 12.—*Form of Requisition, under Section 42.*

To the * of the of , in the county of

In the matter of the charity called †
in the of
in the county of

Under the provisions of the 42nd section of "The Charitable Trusts Act, 1853," and in pursuance of an order of the Charity Commissioners for England and Wales, you are required to allow a notice of an application respecting the above charity, which is intended to be made to‡

with the sanction of the said commissioners, to be affixed to or near the door of the and to remain so affixed for a period of fifteen days at the least.

Dated this day of 185 .

*

* Describe the persons to whom the requisition is to be addressed, and the church or chapel of the parish or place where the notice is to be published.

† Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

‡ Describe the judge of the Court of Chancery, or the county or other court, as the case may be.

* Signatures, descriptions and residences of the persons intending to make the application.

No. 13.—*Form of Certificate as to Publication of Notice.*

To the Charity Commissioners for England and Wales.

In the matter of the charity called *
in the of
in the county of

I

hereby certify that a notice in writing, in the form directed by the board, of an application intended to be made to†

for the

was in accordance with the directions of the said board duly affixed to the door of the of on the day of 185 .

Dated this day of 185 .

*

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

Name, description and residence of person certifying.

† Describe the judge of the Court of Chancery or the county or other court, as the case may be.

State shortly here the purposes of the application.

* Signature, description and residence of the person certifying.

No. 14.—*Form of Application for the Authority of the Board to grant a Lease.*

To the Charity Commissioners for England and Wales.

In the matter of the charity called *

in the of

in the county of

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it was administered.

The undersigned being the

of the above-mentioned charity, and being of opinion that the particular property hereinafter mentioned belonging to the same charity may be beneficially leased in the manner hereinafter mentioned, submit to the board the following statement and proposal in relation thereto, and they request the board to make such orders under their seal, for and in relation to the granting of a lease thereof, as they may think fit.

Trustees or persons acting in the administration or management.

State,

1. The mode and date of the appointments of the existing trustees (if any) of the charity and the number originally appointed.

2. Whether the charity property is legally vested in such trustees, and, if so, by what conveyance or assurance?

3. The name of the township, parish and county in which the particular property proposed to be leased is situate.

4. The nature, extent and general description of the same property, and the interest of the charity therein, and whether forming the whole or part only of the property of the charity.

5. The manner in which it has been let or occupied for the last three years.

6. The amount of the gross rent or income arising therefrom during the last three years.

7. The amount and particulars of the outgoings or deductions in each of such years.

8. The present improved annual or rack-rent value of the particular property.

9. The object of the proposed lease, and whether for building, repairing, improving, mining or other purposes.

10. The reasons for supposing or believing that the grant of the proposed lease will be for the benefit of the charity.

11. The name, quality, profession or occupation and residence of the proposed lessee.

12. The amount and particulars of the proposed rent and other reservations, if any.

13. The proposed term.

14. The nature of the special covenants or provisions (if any) intended to be inserted in the lease.

15. The name and address of any surveyor by whom the property has been or is proposed to be surveyed and valued on behalf of the charity, or to whom the terms and conditions of the proposed lease have been or are proposed to be submitted for approval.

Note.—If any report or valuation, or any map or plan, of the property has been made, the same or a copy of each should be sent herewith. The commissioners will, if they think fit, require the property to be surveyed and valued, and the proposed lease to be reported on or approved by a surveyor appointed by themselves.

We declare that the forgoing statement is in all respects true according to our information and belief.

Dated this day of 185 .

*

* Signatures, professions or occupations and residences of applicants.

No. 15.—*Form of Application for the Authority of the Board for a Sale.*

To the Charity Commissioners for England and Wales.

In the matter of the charity called †

in the of

in the county of

* Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

The undersigned, being the † of the above-named charity, and being of opinion that under the special circumstances hereinafter mentioned a sale of the particular property hereinafter also mentioned can be

† Trustees or persons acting in the administration.

effected on such terms as to increase the income of the charity, or would otherwise be advantageous to the charity, hereby request the board to inquire into such circumstances, and, if after inquiry the board are satisfied that the proposed sale will be advantageous to the charity, to authorize the said sale, and give such directions in relation thereto, and for securing the due investment of the money arising from such sale, as the board may think fit.

State,

1. The mode and date of the appointments of the existing trustees (if any) of the charity, and the number originally appointed.
2. Whether the charity property is legally vested in such trustees, and, if so, by what conveyance or assurance?
3. The name of the township, parish and county in which the particular property proposed to be sold is situate.
4. The nature, extent and general description of the same property, and whether forming the whole or part only of the property of the charity.
5. The estate and interest of the charity therein.
6. The manner in which the particular property has been let or occupied for the last three years.
7. The amount of the gross rent or income arising therefrom during the last three years.
8. The amount and particulars of the outgoings or deductions in each of such years.
9. The present improved annual or rack-rent value of the particular property.
10. The special circumstances under which the sale is proposed, and the advantages likely to result to the charity therefrom.
11. Whether the sale is proposed to be made by public auction or private contract, and whether any offer for the purchase thereof has been received, and the terms of such offer.
12. The name, quality, profession or occupation and residence of the person by whom any such offer has been made.
13. The manner in which it is proposed that the purchase money should be invested, and how any such investment thereof is proposed to be secured.

14. The name and address of any surveyor by whom the property has been or is proposed to be surveyed and valued on behalf of the charity.

Note.—If there is any report or valuation, or any map or plan of the property, the same or a copy of each should be sent herewith. The commissioners will, if they think fit, require the property to be surveyed and valued, and the proposed sale to be reported on or approved by a surveyor appointed by themselves.

We declare that the foregoing statement is in all respects true according to our information and belief.

Dated this day of 185 .

*

* Signatures, professions or occupations, and residences of applicants.

No. 16.—*Form of Application for the Authority of the Board for an Exchange.*

To the Charity Commissioners for England and Wales.

In the matter of the charity called †

in the of

in the county of

† Insert the usual name or designation of the charity, and the name of the parish, township or place for the benefit whereof the charity was founded, or in which it is administered.

The undersigned, being the ‡ of the above-named charity, and being of opinion that, under the special circumstances mentioned in the subjoined statement, an exchange of the particular property therein also mentioned and belonging to the charity can be effected on such terms as to increase the income thereof, or to be otherwise advantageous to the charity, hereby request the board to inquire into such circumstances, and, if after inquiry the board are satisfied that the proposed exchange will be advantageous to the charity, to authorize such exchange, and to give such directions in relation thereto, and for securing the due investment of the money to be paid by way of equality of exchange (if any) for the benefit of the charity, as the board may think fit.

‡ Trustees or persons acting in the administration.

State,

1. The mode and date of the appointments of the existing trustees (if any) of the charity, and the number originally appointed.

2. Whether the charity property is legally vested in such trustees, and, if so, by what conveyance or assurance?

STATEMENT—*continued.*

The particular property hereinbefore referred to and belonging to the said charity, and proposed to be exchanged, is situate in the township of in the parish of in the county of and is described as follows:

Description.	Extent.	How let or occupied.	Present Gross Annual Value.	Deductions.

STATEMENT—*continued.*

The property proposed to be exchanged for the lands and hereditaments hereinbefore described is situate in the township of in the parish of in the county of and is described as follows:

Description.	Extent.	How let or occupied.	Present Gross Annual Value.	Deductions.

Statement—*continued.*

State,

3. The estate and interest of the charity in the property proposed to be exchanged.

4. Whether the charity is possessed of property in addition to that proposed to be exchanged.

5. The special circumstances under which the exchange is proposed, and the advantages likely to result to the charity therefrom.

6. The name, quality, profession or occupation and address of the person with whom the exchange is proposed to be made.

7. The estate or interest of such person in the property to be given by him in exchange.

8. The manner in which the property to be given in exchange and the property to be received in exchange by the charity have respectively been let or occupied during the last three years; and the amount of the gross and net annual rents or income arising therefrom during the same period.

9. The amount of the money (if any) to be received or paid by way of equality of exchange.

10. The manner in which the money (if any) to be so received by the charity is proposed to be invested and secured, or in which any money to be so paid by the charity is proposed to be raised or provided.

11. The name and address of any surveyor by whom the properties to be given and taken in exchange respectively have been or are proposed to be surveyed and valued on behalf of the charity.

Note.—If there is any report or valuation or map or plan of the properties referred to, the same, or a copy of each, should be sent herewith. The commissioners will, if they think fit, require such properties to be surveyed and valued, and the proposed exchange to be reported on or approved, by a surveyor appointed by themselves.

We declare that the foregoing statement is in all respects true according to our information and belief.

Dated this day of 185 .

*

* Signatures, professions or occupations, and residences of applicants.

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